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U.S. Federal Trade Commission
Title:
United States of America before...
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U.S. Federal Trade Commission

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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 10th day of September, A. D. 1947.

COMMISSIONERS:

Garland S. Ferguson, Chairman,
Ewin L. Davis,
William A. Ayres,
Robert E. Freer,
Lowell B. Mason.

In the Matter of GENERAL MILK COMPANY, INC., an export trade association, and its officers, directors and stockholders, as follows: OFFICERS: E. H. Stuart, President, W. T. Nardin, Vice President, L. C. Gunther, Vice President and Treasurer, H. J. Mountrey, Vice President, L. H. Wilson, Vice President, L. A. DeBow, Secretary and Assistant Vice President, DIRECTORS: E. H. Stuart, W. T. Nardin, P. G. Kinzer, J. A. Latzer. STOCKHOLDERS: Carnation Company, Pet Milk Company.	DOCKET NO. 202-7

RECOMMENDATIONS FOR THE READJUSTMENT
OF THE BUSINESS OF GENERAL MILK COMPANY, INC.

To: General Milk Company, Inc., an export trade association, incorporated under the laws of the State of Delaware, with principal office and place of business at 19 Rector Street, New York, New York, and to its officers, directors and stockholders:

The Federal Trade Commission, having reason to believe that General Milk Company, Inc. (hereinafter referred to as the "Association"), an association engaged in export trade (as "association" and "export trade" are defined in the Act of Congress known as the Export Trade Act, approved

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April 10, 1918), and certain of its agreements made and acts done were in restraint of trade within the United States or of the export trade of domestic competitors of said Association, or substantially lessened competition within the United States and otherwise restrained trade therein, summoned said Association, its officers, directors and stockholders to appear before it on the 8th day of June, 1945, as provided by section 5 of said Export Trade Act. Said Association having duly appeared before the Commission pursuant to said summons, and a formal investigation into the alleged violations of law having been made, in the course of which testimony and evidence were taken and incorporated into the record, and the Commission having examined the record and made a report thereon and concluded therefrom that certain agreements made and acts done by such Association have been and are in violation of the law,

NOW, THEREFORE, pursuant to the provisions of said Export Trade Act and by virtue of the authority conferred upon it by said Act, the Federal Trade Commission hereby makes to said Association and its officers, directors, and stockholders, the following recommendations for the readjustment of said Association's business:

1. That the Association either divest itself of its wholly-owned foreign subsidiaries engaged in the manufacture and sale of milk products, and rescind all existing agreements with its foreign subsidiaries under which it furnishes consultative advice and renders other assistance in connection with the manufacture and sale of milk products in foreign countries, or in the alternative, withdraw as an export trade association qualifying under the provisions of the statute. The foreign companies to which this paragraph applies, as shown by the record herein, include, but are not limited to, the following:

(a) Societe Ampco, a company organized under the laws of France, on October 10, 1923, which name was changed to Lait Gloria, S. A., on June 29, 1929;

(b) General Milk Products, Ltd., a company organized under the laws of England, on November 7, 1924;

(c) Gluckskleo Milchgesellschaft, m.b.H., a company organized under the laws of Germany, on November 19, 1925;

(d) Handelmaatschappij Amilko, Naamlooze Vennootschap, a company organized under the laws of Holland, on April 27, 1927, which name was changed in 1932 to Amilko, N. V.;

(e) Union Milk Products, Ltd., a company organized under the laws of the Union of South Africa, on March 8, 1940;

(f) Leche Gloria, S. A., a company organized under the laws of the Republic of Peru, on February 5, 1941.

2. That the Association either divest itself of its wholly-owned domestic subsidiaries whose functions are solely to hold the

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stock of foreign companies, or in the alternative, withdraw as an export trade association qualifying under the provisions of the statute. The domestic companies to which this paragraph applies, as shown by the record herein, include, but are not limited to, the following:

(a) International Finance Company, a corporation organized under the laws of the State of Delaware, on September 3, 1926;

(b) International Industries, Inc., a corporation organized under the laws of the State of Delaware, on September 12, 1942.

3. That the Association either divest itself of its minority stock ownership in foreign companies engaged in the manufacture and sale of milk products in Cuba, Panama and Jamaica, and rescind all existing agreements with such foreign companies, producers and others relating to its ownership of such minority stock, or to the establishment and operation of such foreign companies in connection with the manufacture and sale of milk products, or in the alternative, withdraw as an export trade association qualifying under the provisions of the statute. The foreign companies to which this paragraph applies, as shown by the record herein, include, but are not limited to the following:

(a) Compania Nacional de Alimentos, a company organized under the laws of the Republic of Cuba, on December 17, 1931;

(b) Compania Panamena de Alimentos Lacteos, S. A., a company organized under the laws of the Republic of Panama, on December 22, 1937;

(c) Jamaica Milk Products, Limited, a company organized under the laws of Jamaica, March 22, 1939.

4. That the Association in the future either refrain from acquiring stock or any other beneficial interest in commercial enterprises engaged in the manufacture or sale of milk products in foreign countries or in trade in milk products of foreign manufacture within any foreign country, or withdraw as an export trade association qualifying under the provisions of the statute.

5. That the Association amend the so-called Cow's Head Label Agreement so as to delete therefrom the reference to the use of trade marks or labels within the United States or its dependencies. This paragraph applies to the agreement entered into on October 6, 1936, between the Association and Nestle and Anglo-Swiss Condensed Milk Company, a company organized under the laws of Switzerland and a competitor of the Association in many foreign countries.

6. That the Association, so long as it continues to be an export trade association qualifying under the provisions of the statute shall seasonably file with the Commission all information required by the Export Trade Act to be filed annually, and furnish all documentary evidence requested or required by the Commission, pursuant to said Act, whether called for by report forms, by questionnaires or communications, by personal visitation or otherwise.

IT IS ORDERED by the Commission that the Association file with the Commission within ninety (90) days hereof a report stating whether it has elected to comply with the above recommendations and, if so, the manner in which it has so complied.

By the Commission, Commissioner Mason not participating.

S E A L

Otis B. Johnson,
Secretary.

CONCLUSIONS

This investigation of the operations of General Milk Company, Inc., discloses that in recent years this Association's most important function has been to carry on activities undertaken as a result of its ownership of stock in producing companies engaged in the manufacture and sale of canned milk products in foreign countries. In some instances, the capital stock of such producing companies is wholly owned by the Association; in others the Association holds only a minority interest. As a result of this stock ownership, certain contractual relationships, between the Association and these wholly-owned producing companies, and between the Association and the other stockholders in such companies as are not wholly owned, have eventuated. In addition, the record shows that a trade-mark agreement, known as the "Cow's Head Agreement," had been entered into and effectuated by the Association and Nestle and Anglo-Swiss Condensed Milk Company, a competitive Swiss company, operating on a world-wide basis. All of these factors and agreements will be examined and given consideration, as well as some other miscellaneous activities of the association.

I. Wholly-owned Foreign Subsidiaries.

Subsequent to its organization in 1919, and until 1923, the chief activities of the Association were in furtherance of the export of domestic milk products manufactured and supplied by its stockholders. After 1923, the Association began to organize or otherwise acquire companies in foreign countries which were entirely engaged in manufacturing and selling milk products in foreign countries. The Association, through such foreign subsidiaries, owns milk producing plants in France, England, Germany, Holland, the Union of South Africa, and Peru. The companies located in France, England, Germany, and Holland are owned by the Association through a wholly-owned domestic corporation which engages in no activity other than holding stock in foreign subsidiaries of the Association and receiving dividends therefrom. The South African and Peruvian companies are owned directly by the Association. Although its foreign companies are operated under the laws of the respective countries where located, the Association maintains contact with the operating personnel of each company and furnishes each such company with services of an advisory or consultative character, and receives stipulated fees in return.

The evidence indicates that the Association through such foreign companies entered into foreign production and sale of milk products in foreign countries in order to hold markets previously won through exportations from the United States; that the enactment of protective tariffs and preferential quota laws in various countries gave substantial preferences to producers in those countries; and that other important advantages, including lower costs of production and subsidies of foreign governments, arose from time to time in favor of producers domiciled in foreign countries and operating under foreign governments. The Association, therefore, was faced with the alternative of losing such foreign markets because of inability to export to and sell at a profit in said

markets or of building and operating its own plants under the jurisdiction of foreign governments. Hence, the organization and acquisition of foreign companies was for the purpose of meeting competition in foreign countries in instances in which it could not be met by exportations from the United States.

The evidence points to the fact that there was a general decrease in the volume of all milk products exported from the United States between 1919 and 1938, and that the exports of milk products by the Association during the 1930's reflected this general declining trend of exports throughout the Industry. However, it appears that the combined volume of exports by the Association and its stockholders from 1930 to 1944, inclusive, was hardly of sufficient size, as compared to the total volume of exports from this country, to effect any appreciable, and certainly not any controlling, influence upon either the domestic or foreign trade of the United States in milk products.

There is no reason to conclude that the Association's acquisition and ownership of foreign subsidiaries, per se, had the effect of decreasing its exports of canned milk products, since exports from the United States to the foreign countries involved had, or were about to, become non-existent, for the reasons stated, which antedated and brought about such acquisitions. Although the record shows that a greater portion of the Association's business has been in canned milk products which were manufactured in and shipped from some foreign countries to other foreign countries, evidence is lacking that such foreign activities on the part of the Association at any time have effected restraints upon domestic trade, or in themselves, independent of other controlling factors, upon export trade.

The Commission recognizes the fact that the activities of the Association in the field of foreign production and trade between foreign countries were, as far as the evidence shows, embarked upon in good faith, as a normal and legitimate response to the imposition of obstacles in the path of the export trade from the United States and to changing commercial conditions brought about by factors beyond its control. Recognition is also given to the fact that the Association's foreign productive program enabled it to maintain its trade position in certain areas, a result which cannot be condemned in the light of the fact that competitors, both foreign and domestic, were at liberty to adjust themselves to the self-protective measures adopted by the foreign countries involved.

The Association maintains, as a legal proposition, that while the Export Trade Act provides that associations organized under it shall engage solely in export trade, the history of the Act indicates that the legislative intent was to differentiate between export trade and domestic trade and to make it clear that under no circumstances could the activities of such associations extend over into or include interstate commerce; that the Antitrust Acts do not prohibit two or more American corporations or individuals from engaging in joint productive enterprises within foreign

countries or in trading between foreign countries; that the Export Trade Act, setting up permissive exceptions to the antitrust laws, did not add to the prohibitions of those laws or proscribe, as new offenses, acts or practices not otherwise illegal.

As opposed to this, it may be argued that the word "solely" in the clause in the law reading "actually engaged solely in export trade" is to be strictly construed and that an Association engaging in production in foreign countries or in trade between foreign countries is exceeding the powers granted to it by the statute. It can be said also that in spirit the Export Trade Act contemplates that the organization and operation of the combinations to which exemptions are granted are to be confined exclusively to operations and functions in connection with the exportation of commodities from the United States to foreign countries. Apparently, the question involved here was not considered one way or the other by Congress, but it is not to be presumed that there was any intention of encouraging the formation of combinations among American enterprises to go into business in foreign countries.

From the standpoint of the well-settled policy of the United States to prevent the growth of combinations and restraints of trade generally, it must be held that the scales are weighted against the contention that the statute is to be so construed as to facilitate or encourage combinations of American enterprises operating in international trade outside the sphere of the export trade of the United States. The Commission is unwilling to place the stamp of administrative approval upon the Association's ownership of foreign subsidiaries which are not engaged in any respect in the exportation of milk products from the United States. It is of the opinion that broad considerations of policy and the inadvisability of setting a precedent which might serve as a vehicle for a further increase in the concentration of economic power in this country should impel it to recommend that General Milk Company, Inc. divest itself of its wholly-owned subsidiaries, or in the alternative, take steps to withdraw as an export trade association qualifying under the provisions of the statute.

II. Contracts with Wholly-Owned Foreign Subsidiaries.

Supplemental to the Association's acquisition and ownership of its foreign subsidiaries in France, England, Germany, Holland, Peru and the Union of South Africa, it entered into certain contractual relationships with them. Agreements known as consultant agreements were effectuated, which provided that the Association should furnish consultative advice, instructions, assistance in connection with all aspects of the businesses of these wholly-owned foreign subsidiaries. Such advice and assistance appeared to have been a necessary and reasonable incident of the ownership and operation of these producing companies operating in these foreign countries. However, since the Commission finds that an export trade association qualifying under the provisions of the Act can not engage in activities other than exporting from the United States, the Commission concludes it should recommend that General Milk Company, Inc. rescind the contracts in question, or in the alternative, take steps to withdraw as an export trade association qualifying under the provisions of the statute.

III. Minority Interest in Foreign Companies.

Another phase of the investigation deals with agreements that were entered into by the Association with certain foreign producers relating to the establishment and operation of companies engaged in the manufacture of milk products in Cuba, Panama and Jamacia. The Association contends that its joint venture in production in these countries was necessary to meet foreign competition in these markets, because the volume of consumption of milk products therein was so small as to warrant the operation of only one plant in each of those countries.

A. The Cuban Company.

For more than ten years prior to 1931, the Association maintained a branch office in Havana and supplied the Cuban market by exporting milk products from the United States. This market witnessed a substantial growth and an increase in consumption during those years, and there developed a very keen competition from Holland. On December 17, 1931, a jointly-owned corporation was organized in Cuba under the name of Compania Nacional de Alimentos. The stockholders were Amilko, a wholly owned subsidiary of the Association, Libby, McNeill & Libby of Canada, Ltd., a wholly owned subsidiary of Libby, McNeill & Libby, a domestic corporation, and the Nestle & Anglo-Swiss Condensed Milk Company of Switzerland, the latter two companies being competitors of the Association.

Supplementing the organization of Alimentos, the stockholders entered into a voting trust agreement. Prior to the time of the organization of Alimentos, the Nestle Company owned a Cuban company which was engaged in selling Nestle's milk products in Cuba. The stock in this selling company was transferred to Alimentos and a new selling company was organized under the name of Productos Lacteos Selectos S. A. This company was thereupon used to sell the milk products of Alimentos, its stock being subject to a voting trust agreement identical with the voting trust agreement relating to the Alimentos stock above mentioned.

The Association, the Nestle Company, and Libby Canada each entered into an exclusive sales agreement with Alimentos. The Association leased its trade-marks to Alimentos, appointed that company its exclusive sales agent, and agreed to refrain from sales of milk products in Cuba except upon orders emanating from the Cuban Company. On its part, Alimentos agreed that it would not export from or sell for resale outside of Cuba milk products bearing the labels of the Association, or products under trade-marks leased by the Association to the Cuban Company. Both the Association and Alimentos undertook to endeavor to prevent infiltration into Cuba of milk products under the leased trade marks of the Association.

B. The Panamanian Company.

In 1937 the Association, which was then engaged in marketing milk products in Panama, learned that the Nestle Company was giving consideration to the construction of a condensery in that country. The Association

says that in order not to lose an existing market and because the demand was insufficient to warrant the operation of more than one local condensery in Panama, it entered into an agreement with the Nestle Company, pursuant to which a producing company was organized, known as the Compania Panamena de Alimentos Lacteos, S. A. The purpose of the company was to build and operate a milk condensery in Panama.

Supplemental agreements were entered into between the two stockholders relating to the stock and the fees or royalties accruing therefrom, the turning over of the stockholders' businesses to Panamena, and the supplying to Panamena of whatever milk products it needed to import. It was agreed that Panamena would not sell milk products outside of Panama so long as the shareholders continued to own their respective stock interest in that company. It was likewise agreed that the Panamena should become the exclusive sales agent for the Association's products, and this company agreed not to export such products from Panama. It was also agreed that the Association and the Panamena would endeavor to prevent infiltration into Panama of milk products labelled with the Association's brand and trade-mark.

C. The Jamaican Company.

In 1938, the Association and the Nestle Company each had under consideration construction of a condensery in Jamaica. This is said to have been brought about by the prevailing high import duties on milk products then being exported to that country. Here again, it was thought that the operation of more than one local manufacturing plant in Jamaica would not be profitable. Therefore the Association and the Nestle Company, on March 22, 1939, organized the Jamaica Milk Products, Ltd. under the laws of Jamaica.

It was agreed by the Association and the Nestle Company that each would turn over its business in the sale of milk and milk products to the Jamaica Company and that they would sell their milk products exclusively to the Jamaica Company. It was also agreed that the parties were to lease their Jamaican registered trade-marks to the Jamaica Company and endeavor to prevent infiltration into Jamaica of milk products bearing their trade-marks. Exclusive sales agreements similar to those existing between the two stockholders in the Cuban Company were entered into with the Jamaica Company.

Since the organization of the Jamaica Company, the Association and the Nestle Company have annually entered into one-year so-called manufacturing agreements with the Jamaica Company, providing for the sale to them of unlabelled milk products manufactured by the Jamaica Company and for the resale by them to the Jamaica Company of such products after they have been fully labelled. This arrangement was designed to accomplish the same result as would have been accomplished had the Association leased to the Jamaica Company the trade-marks owned by the Association in Jamaica. However, under the Jamaican trade-mark law, this was not permissible. The Jamaica Company agreed also not to sell any of its milk products outside of Jamaica and undertook to use its best endeavors to prevent any of said

goods distributed by it in Jamaica from infiltrating into other countries. The members of the Association, the Carnation Company and the Pet Milk Company, also entered into exclusive sales agreements with the Jamaica Company.

D. Conclusion.

The same considerations apply to the Association's minority stock ownership in the foreign producing companies in Cuba, Panama and Jamaica as demand recognition in connection with its wholly-owned subsidiaries in Europe, South Africa and Peru. And the contracts and agreements which have grown out of the exercise of the Association's rights of ownership in each case are subject to the same tests. Therefore the Commission concludes it should recommend that General Milk Company, Inc. divest itself of its stock interest in the Cuban, Panamanian and Jamaican companies and rescind the contracts flowing therefrom, or in the alternative, take steps to withdraw as an export trade association qualifying under the provisions of the statute.

IV. Cow's Head Label Agreement.

In 1936, the Association and the Nestle Company entered into an agreement which is commonly referred to as the Cow's Head Label Agreement. For a period of 17 years prior to that date, the Association had used trademarks which bore or included a picture of a cow's head as an integral part of the design used on labels placed on milk products sold in foreign markets. At the same time, a similar label was also developed and widely used by the Nestle Company which operated in competition with the Association in various foreign countries. It is alleged that as a result of the similarity between the cow's head design and the labels of the two competitors, confusion arose among their customers, especially in countries where illiteracy was more or less prevalent and the chief means of identifying any product was by its label. The asserted purpose of the agreement was to avoid this confusion and resolve the conflict between the two competitors arising from their respective trade-mark claims.

The Association and the Nestle Company therefore entered into an agreement with reference to the use of the Cow's Head Label, which divided the markets of the world into three categories, namely, those reserved to the Nestle Company, those reserved to the Association and "open markets." The markets of the Nestle Company and the Association, respectively, were to be those in which the previously established use of the Cow's Head Label of either party predominated over the others' use in such markets. The "open markets" were to be those not classified either as Nestle markets or Association markets. Each party agreed to refrain from using its Cow's Head Label in the others' markets. It was further agreed that in case either party desired to establish this label in any "open market" that party would reach an agreement with the other party that such markets should thenceforth be considered as belonging to such party who should first indicate its desire to secure the market in question.

The Cow's Head Label had been established in some 84 markets and each party to the agreement had achieved priority in certain of these markets.

The Association agreed not to use the Cow's Head Label in 24, and the Nestle Company in 60 markets theretofore established. Among the markets which were allocated to the Association were North America, including the U.S.A., U.S. dependencies, Newfoundland and the Phillippines, Canada, St. Pierre and Miquelon. The Nestle Company agreed not to use Cow's Head Labels in North America.

Two questions arise from this agreement: First, did the agreement in fact accomplish more than to resolve conflicts and confusion in connection with the trade-mark claims of the respective parties, and did it in fact effect a restraint upon import trade into the United States or upon domestic trade within this country; and second, did the Association exceed its authority by making an agreement which involved the use of its own or a competitor's label in the United States and its dependencies?

As to the first question, the statistical evidence indicates that there was no significant dimunition of sales of milk products in the aggregate by the Association in territories reserved to the Nestle Company subsequent to the execution of the agreement in 1936. On the contrary, the facts in the case prove that such sales by the Association increased in the countries in which the Association, prior to 1936, had sold under its Cow's Head Label, and subsequently under another label after having discontinued the use of the former. Of the 24 countries in which the Nestle Company was given the exclusive right to sell under the Cow's Head Label, there appear to have been 13 territories wherein no sales were made by the Association either before or after the 1936 agreement.

The Association contends that the Cow's Head Label Agreement related not to the sale of milk products as such in foreign markets but sought merely to eliminate the existent confusion between labels so similar in design that trade-mark infringement litigation was resulting from their use in the same markets; and that the only competition, if any, which was terminated was solely competition engendered through the use of similar labels which caused buyers to confuse the product of one with that of the other manufacturer. It also makes the point that its sales have increased in markets in which it agreed to refrain from using the Cow's Head Label.

Of course the Cow's Head Agreement related not only to milk products exported from the United States by the Association but also to such products manufactured by the Association through its wholly- or partly-owned foreign subsidiaries. This being true, the agreement was of worldwide scope and effect. However, insofar as it relates to non-American products and territory, it cannot be said that it runs afoul of the provisos of the Webb-Pomerene Act relating to restraints upon domestic trade or competing American exporters.

The second question, as to whether or not the Association exceeded its authority in entering into a trade-mark agreement involving the use of certain labels within the United States and its dependencies must be answered in the affirmative because the Association is prohibited by law from engaging in the domestic manufacture or distribution of milk products

within the United States and its dependencies. Therefore, the Commission concludes it should recommend that the Association amend the so-called Cow's Head Label Agreement so as to delete therefrom all reference to the use of trade-marks or labels within the United States or its dependencies.

V. Association as an Exclusive Export Agent.

The agreement among the members of the Association provided in effect that the export business of each member should be conducted by the Association. The Association was to be the exclusive selling agent of all evaporated and condensed milk marketed by the members in countries outside of the United States, its territories and dependencies. Nevertheless, the record indicates that this arrangement was not observed; that it relates only to direct marketing of milk products in foreign countries; and that the members of the Association have in fact made exports from the United States to foreign countries. The record is barren of any evidence of any restraint upon competing American exporters arising from this agreement. It is to be concluded that no recommendation is called for in respect thereto.

VI. Sales Policy

The Association pursued in the main a policy of distributing its products in foreign countries through exclusive distributors or agents. In sales made to domestic exporters, for foreign shipment, the general policy was to remit to its foreign sales agent in the country to which shipment was made an amount equal to the commission which would have been earned had the sale been made direct by the foreign agent. In practice, the use of exclusive agents in foreign countries to market American products is often unavoidable if efficient sales outlets are to be obtained. The practice of the Association in respect of this policy does not appear to have effected any unlawful restraint upon domestic competitors and hence imposes no necessity for a recommendation.

VII. Domestic Subsidiaries

The Association has two wholly owned domestic subsidiaries whose functions are solely to hold the stock of foreign corporations owned by the Association. As to the ownership of such subsidiary domestic corporations, which perform no important function other than holding the stock of foreign corporations for and on behalf of the Association, it is to be said that such stock holdings fall within the same category as those of its wholly-owned foreign subsidiaries and call for the same recommendation.

VIII. Non-filing of Information.

Pursuant to its invariable rule, the Commission has requested the Association annually to file information with respect to the methods and plan of operation followed by the Association in the conduct of its business, together with its relationships, contractual and otherwise, with other associations, corporations, partnerships, and individuals. The Association

failed to file its contracts and other information with reference to its ownership of foreign manufacturing companies in the belief, so it is said, that such data related to activities outside the scope of the Act, and did not relate to exporting from the United States. Copies of these contracts were, however, furnished to an investigator of the Commission in 1944. The conclusion is reached that information concerning such contracts and activities is relevant to the plan under which the Association's business is done and to its relation with other associations, corporations, and individuals; and that a recommendation should be made to the Association that, so long as it continues to be an export trade association qualifying under the provisions of the statute, it shall seasonably file all information hereafter required either by law, or by the Commission acting pursuant to the law.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

GENERAL MILK COMPANY, INC.,
an export trade association, and
its officers, directors and
stockholders, as follows:

Officers:

E. H. Stuart, President,
W. T. Nardin, Vice President,
L. C. Gunther, Vice President and Treasurer,
H. J. Mountrey, Vice President,
L. H. Wilson, Vice President,
L. A. DeBow, Secretary and Assistant
Vice President,

Directors:

E. H. Stuart,
W. T. Nardin,
P. G. Kinzer,
J. A. Latzer.

Stockholders:

Carnation Company,
Pet Milk Company.

DOCKET NO.
202-7

REPORT OF INVESTIGATION

I. THE PROCEEDINGS.

Pursuant to the provisions of an Act of Congress, approved April 10, 1918, entitled "An Act to Promote Export Trade and for Other Purposes" (40 Stat. 516, 15 U.S.C.A. Secs. 61-65) commonly known as the Webb-Pomerene Act, (hereinafter sometimes referred to as the Export Trade Act), and by virtue of the authority conferred upon it by said Act, the Federal Trade Commission did, on the 30th day of April, 1945, issue its Notice of Investigation and Summons to General Milk Company, Inc., (hereinafter referred to as the "Association"), a corporation registered with the Commission as an association engaged solely in export trade as provided in said Act, and to its officers, directors and stockholders, as above named.

The said Notice and Summons set forth that the Commission had reason to believe that the said named parties may have entered into certain agreements and done acts in violation of law by means of the matters and things specified in the Bill of Particulars attached to said Notice and Summons.

Pursuant to the order of the Federal Trade Commission, hearings for the reception of testimony and evidence in this investigation were held before a trial examiner, duly appointed by the Commission in New York, N. Y., on August 28, and 29, 1945. Thereafter, the investigation was closed by order of the trial examiner. Sworn testimony and documentary evidence were received in the record, the parties were requested and permitted to make such statements for the record and to submit such information to the Commission as they desired to offer. The proceedings were reduced to writing and the transcript of the record and exhibits were filed in the office of the Commission. The Commission, having examined and analyzed said record, makes this report on the facts.

However, before reporting in detail upon the activities of the Association, a brief reference in general to the canned milk industry should be made.

II. THE CANNED MILK INDUSTRY.

A. Origin and Development of Manufacturing Processes.

Although the term "canned milk" comprises several products, it is necessary herein to refer to two only, namely: sweetened condensed and evaporated milk. Sweetened condensed milk may be defined as fresh cow's milk after much of the water has been removed and sucrose or dextrose added. Evaporated milk may be defined as fresh cow's milk from which a considerable quantity of water has been removed by a process of evaporation and which has been sterilized in hermetically sealed cans.1/

In 1853, the process of producing concentrated sweet milk by evaporation in vacuo without the admixture of sugar or other foreign matter was invented by one Gail Borden, an American.

The process patented by Borden provided for concentrating milk in a vacuum pan from which all air was excluded during evaporation, with the result, as claimed, that incipient decomposition was prevented. The vacuum pan had been invented in England as early as 1813 and its use in connection with milk permitting rapid evaporation at low temperature was apparently first made in 1835.2/ In 1884, Meyenberg was granted a patent by the United States on a process of sterilizing by steam condensed milk in cans; and, in 1885, that process was used in connection with the organization and operation of the Helvetia Milk Condensing Company, Highland, Illinois.3/ Borden, then, was the first to successfully make and sell condensed milk; and Helvetia Milk Condensing Company is recognized as the

1/T. 38, 39.
2/T. 38-40. (See U.S. Pat. No. 15,553, Aug. 19, 1856; also Leslie's Weekly, May 22, 1858).
3/ T. 41.

first, perhaps, commercially successful packer of evaporated milk. The fundamental processes utilized in the manufacture of condensed and evaporated milk products have remained materially unchanged.4/

B. Consumer Demand.

The over-all demand of consumers for evaporated milk exceeds that for condensed milk. Recently, millions of cases have been supplied alike to armed forces of the United Nations, and civilians in this and foreign countries. It is estimated that the production of evaporated and condensed milk in the United States, in 1944, totaled 3,764,336,000 pounds,5/ while, in 1919, the total was 1,883,448,000 pounds.6/ Impetus was given to growth of the industry by the Spanish-American War, the first World War, an increased demand during the depression period in the years, 1930 to 1936, and by wide-spread favorable comment of physicians, for example, upon results obtained from use of such milk products as food for infants.7/

III. THE ASSOCIATION.

A. Factors Preceding Formation.

During World War I, domestic producers of evaporated and condensed milk greatly increased their manufacturing capacity to meet the resultant consumer demand abroad. Upon the cessation of hostilities in 1918, certain manufacturers of milk products, hereinafter more particularly described, found themselves not only with increased production capacity but stocks of milk products on hand in excess of the domestic demand. A solution of problems presented thereby was sought by three domestic producers and plans were considered for the formation of an export trade association.8/ On April 4, 1919, the Helvetia Milk Condensing Co., an Illinois corporation with its principal office in Highland, Illinois; Carnation Milk Products Company, a Maine corporation with its principal offices in Chicago, Illinois and Seattle, Washington; and the Highland Milk Condensing Co., a Pennsylvania corporation with its principal office in Elkland, Pennsylvania, entered into an agreement to organize and operate an export trade association under the Webb-Pomerene Act of April 10, 1918.9/ The preamble of this agreement reads as follows:

"WHEREAS, the parties hereto are engaged in the manufacture and sale of evaporated milk and contemplate the manufacture by one or more of the said parties of condensed milk,

And, Whereas, the production of evaporated and condensed milk in the United States is greatly in excess of the present domestic consumption of said commodities, and it is desirable and necessary to find and develop markets for the said commodities in foreign countries,

4/T. 42 (See Hunziker, Condensed Milk and Milk Powder, 5th Ed. 1935, p. 12).
5/T. 46 (See Evap. & Dry Milk Report, U.S. Dept. Agri. Jan. 29, 1945).
6/T. 45.
7/T. 43, 44 (See Story of Evaporated Milk, Irradiated Evaporated Milk Institute, Chicago, Ill.)
8/T. 51, 52.
9/T. 53; Ex. 1, Doc. 13-E. See III, F. infra.

And, Whereas, the said parties are desirous of combining their resources for the purpose of entering the markets of such foreign countries, and the development of export trade from the United States, in accordance with the permission and privilege extended to manufacturers under the Act of Congress, generally known as the Webb-Pomerene Act.

And, Whereas, the parties hereto are proceeding with the organization of a corporation, the stock of which shall be owned by the parties hereto, through which corporation it is intended that the said export trade shall be established and developed,

NOW, THEREFORE, this memorandum sets forth the agreement between the respective parties with reference to the respective rights and duties of the several parties hereto, with reference each to the other and to the said Export Corporation."

B. Description of Organization.

On April 5, 1919, American Milk Products Corporation was incorporated in Delaware. Its name was changed by charter amendment to General Milk Company, Inc., on December 26, 1930. A further amendment on January 13, 1940, broadened the scope of the Association's charter and provided for an extension of financial assistance to its related and subsidiary companies. The principal office of the Association at the time of the hearing herein was located at 19 Rector Street, New York, N. Y.10/ The Association was primarily organized for the purpose of engaging solely in export trade as defined in the Act.11/ Paragraph "Third" of the Certificate of Incorporation reads as follows:

"THIRD. The objects and purposes for which and for any of which this corporation is formed are, to do any or all of the things herein set forth to the same extent as natural persons might or could do, viz:

To engage solely in export trade as the term export trade is defined in the Act of Congress approved April 10, 1918, entitled, 'An Act to Promote Export Trade and For Other Purposes,' commonly known as the 'Webb Act,' namely, 'trade or commerce in goods, wares or merchandise exported or in the course of being exported from the United States or any Territory thereof to any foreign nation,' and as defined in any and all Acts of Congress amendatory of or supplementary to said Webb Act, and, in connection with such trade, to do any and all things necessary and incidental thereto, including the following, provided that this corporation shall not have power to do any act or thing because of the doing of which it would be deemed to be engaging in business other than export trade as defined by the said Webb Act and any and all acts amendatory thereof or supplementary thereto:" (There follow twelve subparagraphs, of which the first six and the ninth and eleventh are here set forth.)

10/T. 10; Ex. 1, Docs. 13-A, 13-B, 13-C.
11/T. 52-53; Ex. 1, Docs. 13-A, 13-B, 13-C.

"To buy and sell for its own account merchandise of every kind and nature, for exportation, and to export the same, from the United States to all foreign countries.

To buy and sell merchandise of every kind and nature for exportation, and to export the same, from the United States to all foreign countries, for the account of others, and incidental thereto to make advances on consignments of such merchandise, or to hypothecate the same.

To act commercially and generally as agent for other corporations, partnerships, associations and individuals, to the extent permitted by the corporation laws of Delaware hereinafter referred to.

To charter, purchase or otherwise acquire any interest in vessels, both for the accounts of itself and for the account of others, for the carrying of freight or passengers between the United States and any foreign country and between any foreign countries; and to operate such vessels.

To contract for and engage in the construction in any foreign country of any structure or article made entirely or partly of any article exported by this corporation.

To appoint agents and representatives in all parts of the world for the purpose of carrying on any and all of the objects of this corporation.

To acquire the good will, rights, property and franchises of any person, firm, association or corporations, and to pay for the same in cash or bonds of this corporation, or otherwise, and to hold or in any manner dispose of the whole or any part of the property so acquired.

To have one or more offices, to carry on any or all of its operations and business, and without restriction or limit as to amount to purchase or otherwise to acquire, hold, own, mortgage, sell, convey or otherwise dispose of real and personal property of every class and description in any of the states, districts, territories or colonies of the United States and in any and all foreign countries, subject to the laws of such State, territory, colony or country."

In the beginning, the Association in fact did engage chiefly in the exportation and sale of canned, evaporated or condensed milk.12/ However, competitive conditions subsequently arose which caused the Association to acquire, directly or indirectly, foreign producing plants.13/ Immediately after its incorporation, the Association was appointed exclusive selling agent by its stockholders for all canned milk products to be marketed abroad. The shareholders undertook to furnish the Association with one

12/T. 64, 65.
13/T. 31, 125-143, 160, 161. See IV, infra, B to H, incl.

million cases for export during the year 1919. The Association agreed to buy its canned milk requirements from its shareholders provided those requirements were not in excess of what the latter were willing to supply, and if so, then the Association was authorized to buy from other milk manufacturers.14/ A price formula adopted for use by the Association shareholders in pricing and invoicing milk products sold to the Association was based on the price at which the Association sold such products.15/ Each of the stockholders obligated itself to furnish its quota of milk products calculated upon the percentage of stock owned in the Association. Eventually, under this plan, the stockholders became subject to requisition by the Association for milk products in the following proportions: Carnation Company, 65%; Pet Milk Company, 35%.16/ The Association undertook to foster foreign sales, develop its own specified labels and sell or dispose of any labels so developed to none other than its own stockholders.17/ The undertakings relating to foreign sales and labels are contained in an agreement between the Association and the member stockholders entered into on April 12, 1919, shortly after incorporation of the Association, and read as follows:

"WHEREAS the parties of the first part are manufacturers of evaporated milk, and contemplate the manufacture of condensed milk, in the United States, and

WHEREAS the party of the second part is a corporation organized for the sole purpose of carrying on export trade, and

WHEREAS the parties of the first part desire to make an arrangement for the purpose of selling their product in foreign countries and to have such sales made through party of the second part as the selling agent for the parties of the first part,

NOW THEREFORE it is agreed by the parties hereto as follows, to-wit:

FIRST: Parties of the first part agree that party of the second part shall be the exclusive selling agent of all evaporated and condensed milk marketed by parties of the first part in countries outside of the United States, its territories and dependencies. Party of the second part agrees, as such selling agent, to use its best efforts to sell evaporated and condensed milk manufactured by the parties of the first part in all countries outside of the United States, its territories and dependencies.

* * * *

FOURTH: Party of the second part, in carrying on a business of exporting condensed and evaporated milk for parties of the first part, agrees that it will establish agencies either through individual

14/T. 58; Ex. 3, Doc. 11-A.
15/T. 58-59.
16/T. 63; Ex. 1, Docs. 13-F, 13-G, 13-H, 13-K.
17/T. 58, 59; Ex. 3, Doc. 11-A.

representatives in foreign countries, or through manufacturers agencies in such foreign countries, or through brokerage houses in such countries, or in such other way as may seem most advantageous in the development of the sale of the goods manufactured by parties of the first part, and that it will do such advertising and such work of salesmanship as may be necessary and advisable in the conduct of the said export business.

* * * *

SIXTH: It is the purpose and understanding of the parties hereto that the export of the evaporated and condensed milk manufactured by parties of the first part shall be made under a label or labels separate and distinct from the labels under which the business of the parties of the first part is carried on in the United States; that such label or labels shall be the property of the party of the second part. It will, however, be some time before party of the second part can establish such label or labels in foreign markets, and until such label or labels are established, parties of the first part grant to party of the second part the right to sell evaporated and condensed milk under the labels used by parties of the first part in markets of the United States. It is the understanding, however, and agreement between the parties hereto that party of the second part will, as quickly as possible, establish its separate and distinct label or labels, and make all sales of goods for export under such label or labels, except in cases where the demand is expressly for the labels of parties of the first part, and in such cases, party of the second part shall as quickly as possible, without sacrifice of the business, secure the substitution in such markets of the export label.

Until party of the second part has established an export label, on orders taken by it in which no particular label is called for, the parties of the first part may furnish the goods under any label which the said parties, or either of them, have legal right to use in the foreign countries to which such goods are sold, it being the express agreement and understanding that the party of the second part shall not have the right to exploit for permanent business in foreign countries either the 'PET,' 'CARNATION,' or 'HONOR' labels.

SEVENTH: It is expressly agreed between the parties hereto that the party of the second part shall not sell, assign, or dispose of any label which it may establish in the export business to any person, firm, corporation, or partnership other than one or more of the parties of the first part hereto and such other persons as may be joined hereafter with parties of the first part in this agreement. In the event that party of the second part desires to dispose of its export label or labels, it shall offer the same to the parties of the first part and shall dispose of such label or labels to such part of the first part as may offer the highest cash price therefor."

A capital of 20,000 shares having a par value of $100 each was authorized, of which 1,000 shares were issued at the time of the Association's organization, 9,000 in 1923, and 5,000 in 1927. The principal sources of income of the Association have been from sales, dividends and consultants' fees.18/

C. Activities.

The chief activities of the Association have been referred to as follows: (1) Sales of both domestic and foreign milk products abroad; (2) owning foreign companies and stock in foreign companies engaged in manufacturing and selling milk products abroad; (3) acting as consultant to foreign companies; and, (4) owning companies not engaged in manufacturing.19/ The principal activity of the Association at the time of the hearing herein, it was testified, might be characterized as international trade.20/

D. Officers and Directors.

The principal officers and directors of the Association, together with their office addresses, are the following:21/

1. E. H. STUART, President and Director, with offices in the Stuart Building, Seattle, Washington.

2. W. T. NARDIN, Vice-President and Director, with offices in the Arcade Building, St. Louis, Mo.

3. L. C. GUNTHER, Vice-President and Treasurer, with offices at 19 Rector Street, New York, N. Y.

4. H. J. MOUNTREY, Vice-President, with offices at 19 Rector Street, New York, N. Y.

5. L. H. WILSON, Vice-President, with offices at 19 Rector Street, New York, N. Y.

6. L. A. DeBOW, Secretary and Assistant Vice-President, with offices at 19 Rector Street, New York, N. Y.

7. P. G. KINZER, Director, with offices in the Milwaukee Gas Light Building, Milwaukee, Wisconsin.

8. J. A. LATZER, Director, with offices in the Arcade Building, St. Louis, Missouri.

18/T. 54, 55, 94.
19/T. 31, 64.
20/T. 157
21/T. 20; Ex. 1, p. 3.

E. Stockholders.

A brief description of the two shareholders presently comprising the Association is made as follows:

(1) Pet Milk Company, (hereinafter sometimes referred to as Pet), incorporated in Delaware, March 31, 1925, is an operating company as well as the parent of a group of wholly-owned subsidiaries; it operates thirty evaporated milk plants, twenty-nine fresh milk receiving stations, eight can factories, and is engaged in the production of evaporated and other canned milk products in sixteen States. Although a different corporate entity, Pet is an outgrowth of the Helvetia Milk Condensing Company, which began business in 1885 under a 20-year charter from the State of Illinois, and was succeeded by a new Illinois corporation of the same name on February 25, 1905. The Helvetia Milk Condensing Company of Illinois, incorporated in 1905, was one of the organizers of the Association in 1919. It leased, in April, 1920, the plants and equipment of Highland Milk Condensing Company, which was also one of the organizers of the Association. On September 27, 1923, Pet Milk Company, an Illinois corporation, acquired the property of the said Highland Milk Condensing Company. Soon after Pet was organized in Delaware, as aforesaid in 1925, it acquired the assets and liabilities of the Illinois corporation of the same name, and has since that time continued in the manufacture of canned milk products. One of Pet's principal places of business is the Arcade Building, St. Louis, Missouri.22/ Its stock ownership of 35% in the Association determines the percentage of milk products it is obligated to furnish to the Association under agreements with the Association and the other stockholder.23/

(2) Carnation Company (hereinafter sometimes referred to as Carnation) was incorporated in Delaware on May 21, 1920, under the name of Carnation Milk Products Company. The latter name was changed to Carnation Company on November 1, 1929, and has been continued to the present time. Carnation stemmed from a partnership formed in 1889 under the name of Pacific Coast Condensed Milk Company, which was incorporated on December 24, 1900, under the laws of the State of Washington. On October 20, 1910, a new company under the old name of Pacific Coast Condensed Milk Company was incorporated under the laws of Maine, and acquired all the assets of the Washington corporation. On February 7, 1916, the Maine corporation changed its name to Carnation Milk Products Company and its assets were acquired on May 21, 1920, by a Delaware corporation of the same name. Finally, as above indicated, the name of the Delaware corporation was changed to Carnation Company on November 1, 1929.

Carnation is an operating company, as well as the parent of a group of wholly-owned subsidiaries, which owns and operates either directly or indirectly, among other things, thirty-two evaporated milk plants, forty-one receiving stations, and seven can factories located in twenty-four

22/T. 47-49; Ex. 1, p. 3, et seq.
23/T. 55, 63; Ex. 1, Doc. 13-K.

States. Through a Canadian subsidiary, Carnation operates two milk condensing plants and several receiving stations in Canada.24/ The sales quota allotted to Carnation is determined upon the basis of its 65% stock ownership in the Association. One of its principal places of business is the Milwaukee Gas Light Building, Milwaukee, Wisconsin.25/

F. Former Stockholders.

The three original stockholders in the Association were Carnation Milk Products Company, a Maine corporation; Helvetia Milk Condensing Company, an Illinois corporation, and Highland Milk Condensing Company, a Pennsylvania corporation.26/

G. Subsidiaries.

(1) Wholly owned companies.

The Association organized or caused to be organized companies in Holland, England, France, Germany, South Africa, and Peru during the period from 1923 to 1941, which companies are engaged in the manufacture and sale of milk products.27/ The entire shares of capital of these companies are owned directly or indirectly by the Association. Two of the Association's foreign manufacturing subsidiary companies above referred to own stock in other foreign companies.28/

(2) Minority Interest in Joint Owned Companies.

The Association owns a minority stock interest in each of four foreign companies, three of which are engaged in the manufacture and sale of milk products, one each in Cuba, Panama and Jamaica, respectively.29/

(3) Miscellaneous Companies.

The Association owns the entire share capital of a company in the Bahamas and the stock of two domestic subsidiaries. The Bahamas Company was organized February 13, 1935, in connection with foreign exchange contracts and is presently inactive.30/ The two wholly-owned domestic subsidiaries are (a) the International Finance Company, organized by the Association September 3, 1926, as a stock-holding company;31/ and, (b) the International Industries, Inc., organized September 12, 1942, to hold the Association's voting trust certificates in the Cuban Company.32/ A Delaware

24/T. 49-51, 55, 63; Ex. 1, Doc. 13-K.
25/Ex. 1, p. 3.
26/T. 50-53; Ex. 1, Doc. 13-E; See III, A, supra.
27/T. 82-84.
28/T. 84, 85; see infra IV, B, C, et seq.
29/T. 86-89.
30/T. 89, Ex. 1, Doc. 13-R.
31/T. 89, 90; Ex. 2, Docs. 2-A and 2-B.
32/T. 91, 232; Ex. 1, Docs. 13-S, 13-T and 13-U.

corporation, organized by the Association in 1934, to engage in the purchase and sale of fruit juices, was dissolved June 25, 1940.33/ The Association also held stock in another Delaware corporation, organized October 15, 1935, by one of its shareholders to sell milk products in Japan. This company was dissolved April 17, 1942.34/

H. Ownership of Production and Sources of Supply.

As heretofore indicated, the two stockholders in the Association operate a total of 62 domestic factories producing evaporated or canned milk products. One stockholder operates evaporated or canned milk plants in sixteen and the other in twenty-four States and Canada.35/ Through the ownership of the entire share capital of six foreign companies, the Association is engaged in the manufacture and sale of foreign milk products.36/ It also owns a minority stock interest in three other foreign companies, located in Cuba, Jamaica and Panama, which are engaged in the production and sale of milk products abroad.37/

I. Methods of Operation, Sales and Distribution.

(1) Competition from Holland and England.

(a) Holland.

As stated, milk products were purchased at the outset by the Association from its shareholders in the United States and exported to and sold in foreign countries.38/ However, eventually competitive conditions in many foreign markets forced the Association to purchase milk products outside the United States, chiefly in Holland, Canada and England. As early as 1927, the Association was confronted with the alternative of either abandoning sales in markets where Holland competition was active, or acquiring in Holland milk products for sale in such foreign markets, in order to meet competition. Accordingly, in 1927, the Association caused to be organized a company in Holland and thereafter, until 1940, sold products of that company in other countries. After 1940, competition from low cost Holland manufacture ceased, due to the war; and the Association again found it possible to sell American milk products profitably in markets formerly closed by Holland competition. The Association's vice president testified that the acquisition of the Holland plant was made necessary in order to meet competition of producers in Holland selling in foreign markets; and that in no sense has the Association decreased the exportation of milk products from the United States by purchases from its Holland subsidiary and the resale thereof in markets where the Association could not otherwise profitably sell in competition with cheap Holland milk products.39/

33/T. 91.
34/T. 92, 93.
35/T. 49, 50, see supra III, E(1) and (2).
36/T. 82-86.
37/T. 86; see infra. V. A, B and C.
38/T. 64, 65.
39/T. 64-76; 136-143.

(b) England.

After the first World War, many of the countries comprising the British Empire developed their own milk products industries and sought governmental protection against competition from non-Empire countries. This protection was eventually given in part through the imposition of preferential tariffs, the establishment of import quotas, "sterling blocks" and laws to protect empire products. The Association obtained a substantial sale of milk products in England and in 1924, organized a subsidiary which functioned in that country until 1935, solely as a merchandising company. However, in 1932, the Association was faced with the necessity of either ceasing entirely to make sales in certain British Empire countries, or of acquiring milk products at a price low enough to permit absorption of increased duty rates and preferentials which had been adopted in the United Kingdom. The testimony of the Association's Vice-President describing the increased duties, reads as follows:

> "Thus in 1932 there was adopted in the United Kingdom the 'Import Duties Act, 1932' which together with the 'Ottawa Agreements Act' of the same year established a high preferential in favor of milk products imported into the United Kingdom from Empire sources. Prior to such Act, duty was assessed on evaporated milk and on sweetened condensed milk imported into the United Kingdom from foreign countries at the rate of 10% ad valorem plus an additional 'sugar duty' in the case of sweetened condensed milk. After the aforementioned 1932 duty rate revisions, evaporated milk imported into the United Kingdom from foreign countries was assessed at the rate of 6x. ($1.44) per cwt. whereas evaporated milk imported into the United Kingdom from Canada, Australia, New Zealand, Newfoundland and Southern Rhodesia was admitted duty free, and sweetened condensed milk imported into the United Kingdom from non-Empire countries was assessed at the rate of 10s. 4d. ($2.48) per cwt., whereas the same product imported from said Empire sources was subject only to a sugar duty at the rate of 2s. 8d. ($.64) per cwt."

The Association decided to engage in the manufacture, as well as the sale of milk products in the United Kingdom in order to meet competition. Accordingly, in 1935, a condensery was caused to be constructed in Scotland and milk products produced by this plant and by plants in Canada owned by a Canadian subsidiary of one of the Association's stockholders were purchased and resold by the Association or subsidiary of the Association in British Empire markets. Respecting these sources of supply, this officer testified that "in so doing, the Association has in no sense decreased the exportation of milk products from the United States. The development of low cost manufacturing in Holland made impossible the profitable exportation of American-made milk products to foreign markets in which such Holland products were sold; the establishment by British Empire territories of preferential tariffs in favor of Empire products and the imposition of import quotas in the United Kingdom were equally effective in terminating profitable exportation of American-made milk products to British territories. It was because exportation of milk products from the United States

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transaction basis; however, the great bulk of sales made by the Association has been through its exclusive distributors and agents abroad, acting under continuing contracts from year to year. Such agents and distributors as a rule were granted exclusive rights within specified territory to stipulated brands of the Association's products.43/

(3) Types of Sales Contracts.

The principal types of sales contracts, embodying somewhat similar provisions, used by the Association have been designated by the following terms: (a) exclusive distributor, (b) exclusive sales agency, (c) consignment agency, and (d) exclusive distributorship and sales agency contracts.44/

(4) Sales Agents Protected.

In making sales to independent American exporters for export to foreign countries in which the Association has appointed exclusive distributors and agents, the Association in such cases has generally protected such distributors and agents on their commissions. However, with respect to Cuba, Jamaica and Panama, the Association has made sales only to or upon the order of the Association's exclusive distributor in each of those countries.45/

On December 17, 1931, the Association entered into an agreement with its exclusive sales agent and distributor in Cuba to refrain from selling milk products in or for exportation into Cuba except upon the order of such agent or distributor. In the same agreement, the Association leased certain of its trade-marks to the Cuban company it had appointed as its exclusive distributor and the said lessee in turn agreed not to sell for resale in any country outside of Cuba, milk products packed under trade-marks leased to it by the Association. Both parties agreed to endeavor to prevent infiltration into Cuba of milk products under specified leased trade-marks. The other two organizers of the Cuban company also at the same time entered into exclusive sales agreements with the Cuban company.46/ Similar provisions were likewise embodied in exclusive agency contracts between the Association and its exclusive sales agents in Jamaica and Panama. Attention is directed to the provisions of the latter contracts covering sales in Jamaica and Panama, which are herein incorporated by reference.47/

43/T. 76-82. Ex. 1. Doc. 13-M (Sealed evidence)
44/T. 81; Ex. 1, Docs. 13-N to 13-Q, incl.
45/T. 81, 82.
46/T. 216-218, 305; Ex. 3, Doc. 6-E.
47/T. 262-271, 287-298; Ex. 3, Docs. 7-C, 7-D, 8-B, 8-D.

IV. ACQUISITION AND OWNERSHIP OF FOREIGN SUBSIDIARIES.

A. Proceedings.

The Bill of Particulars asserted that the Association owns, controls and operates foreign corporations engaged in the manufacture and sale of milk products in foreign countries. On this matter testimony was given and relevant exhibits were introduced.48/ Further specific reference thereto will hereinafter be made.

B. French Subsidiary.

On October 10, 1923, the Association organized in France the Societe Ampco, a joint stock company, which name was changed on June 29, 1929, to Lait Gloria, S. A., (hereinafter sometimes called the French Company). Since 1923, therefore, this subsidiary has been engaged in manufacturing and selling butter and other milk products in France and its colonial possessions. The capital stock of the French Company is beneficially owned by the Association, although held of record by International Finance Company. The latter domestic subsidiary is engaged in no activities whatsoever other than the ownership of subsidiary companies of the Association, and, the receipt and payment of dividends out of earned surplus. The Association took steps to acquire within France the milk products which it proposed to sell there in order to maintain its market which had been developed over a period of five years. French manufacturers had lower costs on labor and fresh milk products than corresponding costs in the United States. This lower cost enabled them to sell their products in France at a price which made it difficult, if not impossible, for exporters of American-made milk products to compete profitably. It was to meet that type of competition that the Association organized the French subsidiary.49/

C. English Subsidiary.

General Milk Products, Ltd., (hereinafter sometimes called the English Company), was organized by the Association on November 7, 1924, and functioned until 1935 as a selling company for milk products exported to England from the United States and Canada. The Association, for two years prior to 1935, supplied milk from the Canadian plant of one of its stockholders in an effort to escape duty preferentials imposed in 1932 on milk products imported into the United Kingdom. Milk producers in the United Kingdom had other cost advantages over American producers which were further augmented by import quotas established by or prior to 1935. The Association, therefore, seeking to preserve its English markets, caused its subsidiary, General Milk Products, Ltd., in 1935, to erect a condensery in Scotland where this subsidiary has since produced evaporated

48/T. 102-145; Ex. 1, Docs. 1-A, 1-B; Ex. 2, 2-A to 2-G, inc.
49/T. 125-127; Ex. 2, Doc. 2-C.

and condensed milk, and sold such products chiefly in British Empire territories. The Association owns the capital stock of the English Company through the International Finance Company, the aforesaid wholly owned domestic subsidiary of the Association.50/

D. German Subsidiary.

Gluckskiee Milchgesellschaft, m.b.H., (hereinafter sometimes called the German company), was organized by the Association on November 19, 1925, and thereafter engaged in the manufacture and sale of milk products at three or four plants in Germany until World War II. The Association discovered, in 1925, that the business it had developed in Germany was being threatened by an increase of 100% in duty on imported milk products; and that the canned milk industry in Germany had grown sufficiently in size to enable its owners to prevail upon the German Government to double the duty on condensed and evaporated milk imported into Germany. Mr. Gunther, the Association's Vice-President, testified that all exporters of American-made milk products were affected by the duty increase, Department of Commerce statistics disclosing that exports of these products from the United States to Germany fell from 62,280,885 pounds in 1924, to 4,813,620 pounds in 1926. These factors constituted the reason for the action taken by the Association in organizing a subsidiary in Germany. The capital stock of the Germany Company is likewise owned entirely by International Finance Company, the Association being the beneficial owner of such capital stock.51/

E. Holland Subsidiary.

Handelmaatschappij Amilko, Naamlooze Vennootschap was organized in Holland on April 27, 1927, its name being changed in 1932 to Amilko N.V., (hereinafter sometimes called Holland Company). This company, since its organization, has been beneficially owned by the Association, and engaged in the operation of various plants manufacturing and selling milk products in Holland to the Association. The Association in turn has made sales of such milk products in foreign markets, principally where the Association encountered or had to meet competition from Holland and British manufacturers. The low cost of labor, the subsidizing of production by the Government of Holland, together with the rapid expansion of the Holland canned milk industry, were among the factors which combined to enable manufacturers in Holland to undersell their foreign competitors in foreign countries. The Association being unwilling to abandon its foreign business, therefore, sought to take advantage of the local low cost of labor and other favorable conditions by acquiring plants for the manufacture of

50/T. 128-132; Ex. 2, Doc. 2-D; (See Dairy Produce Supplies, 1934; Intelligence Br. of Imperial Eco. Committee, London, July 1935, p. 80; also Notice (235) to Importers and Agents, Custom House, London, Nov. 15, 1932).
51/T. 132-136; Ex. 2, Docs. 2-E, 2-F; (See U.S. Dept. of Commerce, Foreign Commerce and Navigation showing decrease in German Imports, Editions for 1921-1927.

milk products in Holland. The share capital of the Holland Company is owned by the Association, the stock being held by its subsidiary, the aforesaid International Finance Company, and by individuals to whom shares were issued qualifying them as directors.52/

F. South African Subsidiary.

In 1938, the Association began to consider the advisability of entering South Africa in the conduct of its business. The Vice-President testified that tariff duties on imports to the Union of South Africa, in terms of U.S. currency, amounted to $1.53 and $1.38 per case respectively for condensed and evaporated milk, and "made importation of such products from the United States into the Union of South Africa impossible except on infrequent and special occasions when the Government of the Union granted exemption from such duty, such, for example, as drought years in which local fresh milk production was abnormally low"; and also that "the Union of South Africa therefore presented the picture of a country in which there was a substantial demand for milk products and at least a potential demand which was not being fully met by the domestic industry, but which could not be capitalized upon by foreign manufactures because of excessively high import duties." "From the outset of such consideration," he testified, "the Association was fully cognizant of the fact that there was but one method under which it could profitably engage in the sale of milk products in that country, that method being the acquisition of a condensery in the Union of South Africa at which plant it would produce the milk products it sold in that territory." A survey, made in 1939, indicated the existence of a potential consumer demand together with sources of fresh milk to meet the requirements of a new condensery in South Africa. Accordingly, on March 8, 1940, organization papers of Union Milk Products, Ltd., (hereinafter sometimes called the South African Company), were filed, and, shortly thereafter, a condensing plant was erected, since which time the Association has engaged in the manufacture and sale of milk products in the Union of South Africa. The Association owns directly or beneficially all the stock, in the South African Company.53/

G. South American Subsidiary.

In 1938, the Association considered the construction of a plant in Peru wherein a market existed for non-Peruvian milk products due to consumption and the absence in Peru of any canned milk manufacturing industry. There had been competition from Holland, and certain competitive interests in Switzerland were conducting investigations with a view to building a condensery in Peru. In order to avoid losing an existing market which had been developed, the Association, on February 5, 1941, caused to be organized Leche Gloria, S.A., (hereinafter sometimes called the South American Company). Shortly thereafter a condensery was erected and since its completion the South American Company has engaged in the

52/T. 66, 136-140; Ex. 2, Doc. 2-G.
53/T. 103-107; Ex. 1, Doc. 1-A.

manufacture and sale of milk products in Peru. The entire capital stock of the South American Company is owned directly or beneficially by the Association.54/ The testimony in explanation of this investment reads as follows:

> "Then in the late 1930's, the Association learned that Nestle & Anglo-Swiss Holding Company, Ltd., a Swiss corporation, or one of its related companies had been making investigations in Peru with reference to the possibility of building a condensery there. As is apparent from the discussion relating to the Union of South Africa in the immediately preceding section hereof as well as from discussion of its acquisition of manufacturing subsidiaries in other foreign countries set forth in the written statement prepared and filed herein by the Association with reference to Paragraph 2 of the Bill of Particulars herein, the Association was by then fully aware of the fact that when local condenseries were constructed in a foreign country, sooner or later there came a day when the Government of such country moved to protect its local industry by the imposition of import duties sufficiently high to preclude profitable importation of foreign-made milk products on a price basis competitive with that of locally-manufactured products. In Germany and in England, after the imposition of such protective tariffs, the Association had been forced to acquire local manufacturing subsidiaries as the only alternative to abandoning the sale of milk products in those countries. In the Union of South Africa, it had for years been precluded by such a protective tariff from importing milk products and, as hereinabove noted, had finally been forced to acquire manufacturing facilities in that country as the only method by which it could profitably engage in business in that country. This practice of protecting local industry with high import duties is, of course, by no means peculiar to countries foreign to the United States; the United States itself has long engaged in that practice, with the result that foreign capital has interested itself in subsidiary plants within the United States just as American capital, the Association's capital, has been utilized to acquire manufacturing plants in foreign countries closed to importation by protective tariffs.
>
> "So the Association knew full well that if competitive interests constructed a condensery in Peru, it would not be long before the Peruvian Government would be increasing the then low duty on milk products imported into Peru from foreign countries including the United States. Once again, therefore, the Association was faced with the dilemma of losing an existing market for its milk products or of building in that market a condensery at which it would produce the milk products it sold there."

H. Association's Contentions.

The Association takes the position that its ownership of foreign corporations violates no law; that such activity on its part does not in

54/T. 107-112, 115; Ex. 1, Doc. 1-B.

any way constitute engaging in commerce, or tend to restrain trade within or between the United States and foreign countries; and that it does not adversely affect prices within the United States, since such acquisition of foreign subsidiaries was necessitated by the fact that exports of milk products from the United States to foreign countries concerned were an impossibility, or were about to become an impossibility.

The Association has never construed the Export Trade Act as restricting its activities solely to exporting from the United States, but has understood that Act to provide merely that, subject to certain limitations therein set forth, domestic competitors may export their products through an association or corporation jointly owned by them, providing such association or corporation makes no domestic sales in the United States, in which respect the Act sets up an exception to the Sherman Act and the Clayton Act, which, by their terms, brand such joint ownership illegal. It is not, however, the Association's understanding that the Export Trade Act relates in any way to activities other than exporting from the United States in which such an association or corporation may engage or that that Act in any way precludes an association or corporation from engaging in activities other than exporting from the United States.

As for the precise language of the Export Trade Act, it has been the Association's understanding that in speaking of an association or corporation "engaged solely in export trade," Congress was merely emphasizing the dividing line it was drawing between "export trade" and "domestic trade," and was in no sense providing that corporations qualified under that Act to engage in exporting could engage in no other activities; and, that there is sound legal basis for so construing the Export Trade Act. It is urged that as no exception to the Sherman Act or the Clayton Act was required to permit competitive domestic corporations jointly to own a corporation carrying on business not constituting engaging in commerce within the United States or between the United States and foreign countries, there was, therefore, no reason for Congress to refer expressly to such a situation in the Export Trade Act; and that the failure of Congress to provide expressly that an association or corporation exporting goods from the United States while jointly owned by domestic competitors, as authorized by that Act, might at the same time engage in other activities, not illegal either under the Sherman Act or the Clayton Act, is not logically susceptible to the conclusion that Congress, by its silence, thereby meant to preclude such an association or corporation from engaging in any activities other than exporting from the United States.55/

V. JOINT-OWNERSHIP OF FOREIGN CORPORATIONS.

A. Cuban Market Agreements.

(1) Proceedings.

An item in the bill of particulars stated in substance that the Association participated in the management of and acquired stock in Cuban

55/T. 111-113; Ex. 1, p. 274, 275.

corporations engaged in producing and selling milk products, a portion of the stock therein being owned by producers competing in Cuba; that the Association appointed an exclusive agent in Cuba and entered into agreements with reference to labels, exports, manufacture, sale and the prevention of infiltration of non-Cuban milk products into that country; and that the Association acted in concert with competitors in refusing to make sale in Cuba except through a corporation jointly owned by the Association and its competitors. Testimony and exhibits were introduced relative to the matters alleged in this item.56/

(2) Background.

Prior to 1921, the Association developed a market in Cuba, and established a branch office in Havana, where sales of milk products were carried on until 1931. The Cuban market witnessed a substantial growth, and an increase in consumption which, however, was accompanied by keen competition from Holland. The Association operated at a loss of considerable money in Cuba until December 17, 1931, when a jointly-owned corporation was organized in Cuba under the name of Compania Nacional de Alimentos (hereinafter sometimes called the Cuban Company).57/ The stockholders were Amilko, a wholly owned subsidiary of the Association; Libby, McNeill & Libby of Canada, Ltd., (hereinafter sometimes referred to as Libby Canada), a wholly owned subsidiary of Libby, McNeill & Libby (hereinafter sometimes called Libby), a corporation existing under the laws of Maine, and the Nestle & Anglo-Swiss Condensed Milk Company of Switzerland, (hereinafter sometimes called Nestle Company). The Cuban Company was organized following a meeting attended by representatives of the Association, Libby and the Nestle Company, at which meeting the consensus of opinion was that a single jointly-owned plant would prove to be more practicable than three individually owned subsidiaries.58/ A previous preliminary survey of Cuba by the Association indicated that Cuba could not support several new milk condensing plants. The Nestle Company was apportioned sixty-four per cent, Libby Canada twelve per cent, and Amilko twenty-four per cent of the stock in the Cuban Company. This apportionment, it was testified, was "in the ratio which their respective milk products sales in Cuba immediately preceding the organization of Alimentos bore to the total of their said sales volumes."59/

(3) Voting Trust Relating to Stock of Cuban Company.

On December 17, 1931, a voting trust agreement was entered into by Amilko, the aforementioned foreign subsidiary of the Association, Libby Canada, and the Nestle Company.60/ The trust agreement, signed by the said three foreign companies, provided for deposit of the Cuban Company shares in a Canadian bank in favor of trustees. The agreement was designed to protect not only the interests of Amilko and Libby Canada, as minority

56/T. 201-244; Ex. 3, Docs. 6-A to 6-H, inc.
57/T. 204-209.
58/T. 206-210; Ex. 3, Doc. 6-A.
59/T. 209, 226
60/T. 210; Ex. 3, Doc. 6-B, Cf. T. 248, 255; Ex. 4-A to 4-C, incl.; infra VII, C(2).

stockholders, but of the Nestle Company, as majority stockholder. In certain specified instances no action could be taken except upon the unanimous consent of all three trustees and all three holders of voting trust certificates.61/ Each of the three owners of beneficial interests in the stock of the Cuban Company was entitled to nominate one-third of the directors, and to share in any royalties, which were to be divided in proportion to their respective stock interests in the Cuban Company. None of the parties to the trust agreement was to dispose of any shares in the Cuban Company prior to offering such stock for sale fo the other two parties in interest.62/ Two members of the Board of Directors nominated by the Association have attended meetings of the Board, entered discussions and participated in voting; and advice has been given to the local management of the Cuban Company with respect to advertising and other business matters. However, the Cuban Company has maintained its own local personnel to manage its day-to-day business.63/ On January 21, 1941, the Association succeeded to the voting trust certificates in the Cuban Company theretofore held for the Association by Amilko, its foreign subsidiary.64/ The Vice President's testimony on this stock transaction reads as follows:

> "When in the early part of 1940 it seemed likely that German military forces would soon occupy Holland and the Association was taking such action as it could to protect its investment in Amilko, the Association obtained from Amilko a pledge of Amilko's entire share capital interest in Alimentos as collateral securing certain then outstanding funded indebtedness of Amilko to the Association which was due to mature on December 31, 1940. This pledge arrangement was entered into at the instance of the Association solely in order that, without the necessity of any actual share transfer at that time, the Association would be in such position that in the event of German occupation of Holland it could without further recourse to Amilko foreclose on such collateral and thereby preclude its appropriation by the Germans as an asset of Amilko. Following the invasion of the Netherlands in May of 1940 and the consequent default of Amilko on its indebtedness on December 31, 1940, the Association foreclosed on the collateral on January 21, 1941, and purchased Amilko's entire interest in Alimentos stock. Since then, the Association has continued to own twenty-four per cent of the capital stock of Alimentos and has by substitution for Amilko been a party to the Voting Trust Agreement hereinafter discussed pursuant to which all Alimentos stock has always been on deposit with Voting Trustees."

It is contended by the Association that the joint-owners of the Cuban Company, namely, Amilko, Libby Canada, and the Nestle Company, are not now and have never been at any time during the life of the Cuban Company,

61/T. 212, 213.
62/T. 213.
63/T. 214, 220.
64/T. 210, 216.

competitors in Cuba; and that as joint-owners, said stockholders in the Cuban Company are not in competition with each other in Cuba. Moreover, it is contended by the Association that the three stockholders in the Cuban Company were never producers in Cuba.65/

(4) Voting Trust Relating to Stock of the Cuban Sales Company.

When the jointly-owned Cuban Company was organized on December 17, 1931, the Nestle Company owned a Cuban company which had theretofore been engaged in selling Nestle's milk products. To provide for a sales company, the Nestle Company transferred its stock in the selling company to the Cuban Company, and on December 23, 1932, a new selling company was organized under the name of Productos Lacteos Selectos S.A., (hereinafter sometimes called selling company),66/ the stock of which was distributed, March 31, 1934, to the shareholders in the Cuban Company. The selling company was thereafter so utilized for the benefit of the jointly-owned Cuban Company. At the time of the hearing herein, the stock of the selling company was held in a voting trust under a voting stock agreement identical with the Voting Trust Agreement heretofore referred to in respect of the shares of stock jointly held in the Cuban Company.67/ This stock was acquired concurrently with the manufacturing company's stock in the pledge transaction above described, the officer testifying that: "when in 1940 Amilko pledged with the Association the Voting Trust Certificates representing its twenty-four hundred share interest in Alimentos, it also pledged the Voting Trust Certificate representing its twenty-four share interest in Selectos and such Voting Trust Certificate passed to the Association as a result of the aforementioned January 31, 1941 foreclosure."

(5) Joint Exclusive Sales Agency.

The Association, the Nestle Company, and Libby Canada (joint stockholders in the Cuban Company) on December 17, 1931, each entered into an exclusive sales agreement with the Cuban Company. The Association leased its trade-marks to the Cuban Company, appointed that company its exclusive sales agent and agreed to refrain from sales of milk products in Cuba except upon orders emanating from the Cuban Company. On its part the Cuban Company agreed that it would not export from or sell for resale outside of Cuba milk products bearing labels of the Association, or products under trade-marks leased by the Association to the Cuban Company. Both the Association and the Cuban Company undertook to endeavor to prevent infiltration into Cuba of milk products under the leased trade-marks of the Association.68/ Under the terms of said exclusive sales contracts of December 17, 1931, the Cuban Company was precluded from exporting under any of the labels leased to it by the three joint stockholders.69/ The provisions concerning exclusive sales agency, exporting, and infiltration appear as follows in the Association's contract with the Cuban Company:

65/T. 220, 241.
66/T. 214-216, 242; Ex. 3, Doc. 6-C.
67/T. 214-216; Ex. 3, Doc. 6-D; See T. 248, 249; Exs. 5-A to 5-C, incl.; also infra VII, C (2).
68/T. 216-222; Ex. 3, Docs. 6-E, 6-F.
69/T. 238.

"WITNESSETH: 1. That in consideration of the mutual promises hereinafter contained First Party agrees to appoint and does hereby appoint Second Party the exclusive sales agent and distributor of the First Party in Cuba, for condensed and evaporated milk, and agrees to sell exclusively to Second Party or its nominee at prices to be agreed upon by the parties hereto for the term of fifty (50) years, from the 1st day of January 1932 all condensed and evaporated milk imported by Second Party for resale in the Republic of Cuba under the trade-marks, brands and labels of First Party, or under the trade-marks, brands and labels herein leased, demised and let."

* * * * * *

"13. Second Party covenants with First Party that it will not sell or sell for resale in any country outside of Cuba, condensed or evaporated milk or any other product packed under the said labels, brands and trade-marks, or any of them."

* * * * * *

"15. First Party agrees and covenants that it will make no sales of condensed and evaporated milk or any skimmed condensed or skimmed evaporated milk, compound condensed, or compound evaporated or any condensed or evaporated milk to which has been added solids other than milk solids or sterilized whole milk in tin containers, or any of the same, in said Republic; except as aforesaid, nor will it make sales for importation directly or indirectly into said Republic, except upon the orders of the Second Party. Each party further covenants that it will use its best endeavors to prevent infiltration of First Party's brands of the products above enumerated into the Republic of Cuba during the life of this contract."

The Vice-President testified in explanation of the export and infiltration provisions as follows:

"The contracts concerned in no way provide that the Association will refrain from selling milk products in Cuba but only that the Association will sell milk products in Cuba exclusively to a designated distributor; those contracts in no way provide that Alimentos will refrain from exporting any milk products from Cuba but only that Alimentos will not export from Cuba milk products labeled with trade-marks owned by the Association and leased by the Association to Alimentos solely for use on milk products manufactured and sold in Cuba; and those agreements in no way provide that the Association will prevent infiltration of non-Cuban milk products into Cuba but only that it will endeavor to prevent the infiltration into Cuba of those particular milk products which may be labeled with trade-marks owned by the Association."

The Cuban Company had no labels of its own. On December 17, 1931, the two stockholders of the Association also entered into like exclusive

sales agreements with the Cuban Company.70/ The Cuban Company had authority to make sales under the labels of its three stockholders.71/

(6) Manufacturing.

On August 21, 1940, the Association entered into an agreement with the Cuban Company providing for the purchase of milk products by the Association from the Cuban Company and the resale thereof by the Association in foreign markets. To ensure that the transaction did not violate the exclusive sales agreement of December 17, 1931, a letter-form agreement was signed by the parties. A few purchases only were made thereunder and none subsequent to 1941.72/

(7) Trade-Marks of Stockholder.

On June 6, 1941, the Association sub-leased to the Cuban Company the trade-mark of Pet Milk Company, one of the stockholders of the Association.73/

(8) Association's Contentions.

In connection with the foregoing described contracts of the Association with respect to the production and sale of milk products in Cuba, officials of the Association concede, up to the date of the hearing herein, inter alia, (a) that the Association is the beneficial owner of shares of capital stock in two Cuban companies, such interest in each company being evidenced by voting trust certificates; (b) that the Association nominates two of the six directors of the two Cuban companies, respectively, and from time to time offers advice to the local management; (c) that the Association has appointed an exclusive sales agent and distributor in Cuba, as well as in some ninety other foreign territories; (d) that the Association owns a twenty-four per cent interest in the Cuban Company and has granted it a license to use certain trade-marks in Cuba; (e) that the Association has agreed not to export to Cuba except to its exclusive sales agent, and the agent in turn has agreed not to export products from Cuba under the trade-marks of the Association; and, (f) that both the Association and its exclusive agent have agreed to endeavor to prevent infiltration of milk products into Cuba bearing labels of the Association.74/ Officials of the Association deny that its various contracts with or joint stock ownership in the two Cuban companies, including the voting trusts and other contracts with the two joint owners, both foreign companies, are in any sense invalidated by the Export Trade Act or the antitrust acts.75/

70/T. 218, 240.
71/T. 235.
72/T. 218, 219; Ex. 3, Doc. 6-G.
73/T. 219; Ex. 3, Doc. 6-H.
74/T. 219-222.
75/T. 222-224; Cf. T. 317, 318.

B. Panama Market Agreements.

(1) Proceedings.

The Bill of Particulars cited the existence of contracts between the Association and its competitors relative to the production and sale of milk products in Panama. It alleged, in effect, that the Association, acting in concert with a foreign competitor, became a joint owner, participated in the management of, and sold exclusively to a Panamanian corporation; and, agreed to prevent infiltration of milk products into Panama. Testimony was taken and exhibits relative to allegations in this paragraph were received in evidence.76/

(2) Background.

In 1937, the Association was engaged in selling milk products in Panama through a distributor when it ascertained that a foreign competitor was giving consideration to the construction of a condensery in that country.77/ In order not to lose an existing market, and because the demand was insufficient to warrant the operation of more than one local condensery in Panama, a joint agreement was entered into by the Association and the Nestle Company, pursuant to which there was organized, on December 22, 1937, the Compania Panamena de Alimentos Lacteos, S. A. (hereinafter referred to as the Panama Company). It was the purpose of the parties to said agreement to build and operate a milk condensery in Panama; and, under the terms of the agreement, the Association received thirty per cent and the Nestle Company seventy per cent of the stock in the Panama Company.78/ The Association's Vice President's testimony describing the background of this transaction reads as follows:

"So the Association knew that if the Nestle interests constructed a condensery in Panama it was not unlikely that eventually the Panamanian Government would be inposing a high duty on milk products imported into Panama from foreign countries, including the United States. Once again, therefore, the Association was faced with the alternative of losing an existing market for its milk products or building in that market a condensery at which it would produce the milk products it sold there.

"From the outset, however, it was apparent that Panama could not support two milk condensing plants. There was in that small country neither such demand for canned milk nor such supply of fresh milk for condensing as made practical the erection of more than one local condensory and it was obvious that if the Nestle interests and the Association each erected a condensery in Panama, both ventures would prove to be financially unsuccessful. At the same time, it

76/T. 257-282; Ex. 3, Docs. 7-A to 7-D, incl.
77/T. 271, 273; 259-261.
78/T. 261, 262, 272; Ex. 3, Doc. 7-A.

was equally clear that if either constructed a plant in Panama and the other did not, the latter company would shortly thereafter find itself with no business in Panama.

"Out of such dilemma grew negotiations between the Association and the Nestle interests resulting in their agreement jointly to organize a local Panamanian company which would construct and thereafter operate a milk condensery in Panama.

"Compania Panamena de Alimentos Lacteos, S.A., (hereinafter sometimes referred to as the 'Panama Company') was organized under the laws of the Republic of Panama on December 22, 1937, its charter (Document No. 7-A) providing for an authorized capital stock of 250,000 Balboas divided into five thousand shares of 50 Balboas each. All five thousand shares were issued at the time of the formation of the Company and were apportioned between the two shareholders, respectively, in the ratio which their respective sales volumes in Panama immediately preceding the organization of the Panama Company bore to the total of their said sales volumes; seventy per cent in respect of Nestle and thirty per cent in respect of the Association."

(3) Share Ownership.

On December 31, 1937, an agreement between the Association and the Nestle Company was entered into, which provided that neither the Association nor the Nestle Company would sell any of the Panama Company stock publicly; that the Association would nominate two of the seven directors; and that the fees or royalties accruing from the Panama Company would be pooled and re-divided between the Association and the Nestle Company in proportion to their respective share interests in the Panama Company.79/

(4) Purchase of Imports.

On December 31, 1937, the Association and the Nestle Company also agreed: (a) to turn over and sell their entire business in condensed and evaporated milk products in Panama to their jointly-owned Panama Company, and to endeavor to prevent infiltration under their brand names; (b) to supply the Panama Company with whatever milk products it needed to import in proportion to their respective share ownership interests therein; and, (c) that the Panama Company would not sell milk products outside of Panama so long as the then shareholders continued to own their respective stock interest in the Panama Company.80/ The Association's Vice President testified that these provisions were not deemed unusual in view of each party's endeavor to protect their joint enterprise from competition by their own products.

(5) Exclusive Sales Agent.

On the same date, December 31, 1937, the Association and the Panama Company entered into an agreement under the terms of which the Panama

79/T. 263, 272; Ex. 3, Doc. 7-B.
80/T. 264, 265, 305; Ex. 3, Doc. 7-C.

Company became the exclusive sales agent of the Association's products for twenty-five years, and agreed not to export such products from Panama. The parties thereto agreed to endeavor to prevent infiltration into Panama of milk products labeled with the Association's brands and trade-marks. That this exclusive sales contract was assented to by the Nestle Company is evidenced by a footnote therein signed by the attorney-in-fact for that company. The two stockholders of the Association also entered into like agreements with the Panama Company.81/ The exclusive sales agency contract provisions concerning exporting and infiltration, reads as follows:

> "Fourth: Second Party covenants that it will not export or sell for export any condensed or evaporated milk packed under the labels, brands, or trade-marks of First Party."
>
> * * * * * *
>
> "Each party further covenants that it will use its best endeavors to prevent infiltration of First Party's brands of the products above enumerated in the Republic of Panama during the life of this contract."

Respecting the foregoing covenants, he testified that these provisions reflected the agreement with Nestle and were designed to prevent competition from infiltration of "the Association's brands and trade-marks."

(6) Association's Contentions.

In connection with the foregoing described contracts and activities of the Association relating to the production and sale of milk products in Panama, officials of the Association concede and contend: (a) that the Association is the owner of a portion of the capital stock of the Panama Company, has nominated two directors who attend no meetings of the board, and has not participated in the Panama Company's management, except as a substantial minority stockholder;82/ (b) that the Association and the Nestle Company are the only beneficial holders of stock in the Panama Company and have not competed in Panama since the Panama Company was organized;83/ (c) that the Association has turned over its business in milk products in Panama to the Panama Company as its exclusive agent; (d) that it is not a competitor of but rather a joint venturer with Nestle Company in Panama;84/ (e) that the Association has been a party to an agreement to prevent infiltration of milk products under its brands into Panama but has not acted in concert with competitors to keep all foreign milk products out of Panama;85/ (f) that a decision, reflected by an agreement, of two stockholders of all the share capital of a foreign company that that company shall confine its business to its domiciliary situs, is

81/T. 266, 267, 272-275; Ex. 3, Doc. 7-D, p. 3 and 4.
82/T. 267.
83/T. 268.
84/T. 268.
85/T. 268, 269.

not prohibited by the antitrust laws;86/ and, (g) that proxies have been sent to the officers of the Panama Company, which maintains its own local management-personnel, and to the extent that the Panama Company is subject to outside supervision, if any, such supervision stems from the Nestle Company rather than the Association.87/

C. Jamaican Market Agreements.

(1) Proceedings.

The Bill of Particulars specified that the Association entered into agreements with competitors and engaged in activities with respect to the production and sale of milk products in Jamaica which may have violated the law; that with competitors, it acquired the capital stock of a corporation in Jamaica engaged in the manufacture and sale of milk products; that it turned over all its trade and business in Jamaica to a Jamaica corporation jointly-owned by it and its competitors and participated in the management of such Jamaica corporation; and that, with its competitors, the Association prevented any infiltration of non-Jamaican milk products into Jamaica.88/ Evidence and exhibits were admitted with respect to the allegations in this item.89/

(2) Background.

In 1938, the Association and the Nestle Company each had under consideration the construction of a condensery in Jamaica, due to the prevailing high import duties on milk products then being exported to that country.90/ However, since the consumer demand for canned milk in Jamaica was insufficient to make the operation of more than one local manufacturing plant profitable, the Association and the Nestle Company, on March 22, 1939, organized the Jamaican Milk Products, Limited, (hereinafter called the Jamaica Company) under the laws of Jamaica.91/ The Association received thirty per cent, and the Nestle Company seventy per cent of the stock in the Jamaica Company.92/ This was pursuant to an agreement between them to apportion the stock "in the ratio which their respective sales volumes in Jamaica immediately preceding the organization of the Jamaica Company bore to the total of their said sales volumes," it was testified. The testimony as to the volume of the Association's sales in Jamaica was conflicting. Mr. Gunther's testimony, in connection with the Jamaica tariff, reads as follows:

> "Thus in 1938, an importer of non-Empire milk products in Jamaica paid import duty in the amount of US $.892 per case in respect of evaporated milk and US $.87 in respect of sweetened condensed

86/T. 265, 266; 269-271, Cf. 317, 318.
87/T. 267-268, 273.
88/T. 284, 285.
89/T. 284-302; Ex. 3, Docs. 8-A to 8-D, incl.
90/T. 295-297.
91/T. 285, 286, 298; Ex. 3, Doc. 8-A.
92/T. 285, 286, 297.

milk. There were, therefore, practically no importations of American-made milk products into Jamaica."

And further on, he testified as follows:

Q. Had the Association built up a pretty good market in that territory?
A. Yes, sir.

(3) Share Ownership.

On March 23, 1939, the Association and the Nestle Company agreed, among other things: (a) that neither would sell its stock in the Jamaica Company publicly prior to offering it to the other; (b) that so long as the Association owned thirty per cent of such stock it was entitled to name two of the directors; (c) that fees and royalties from the Jamaica Company were to be pooled and redivided between the parties in proportion to their respective share interest in the Jamaica Company; (d) that the parties would turn over their business in the sale of Jamaica milk products to the Jamaica Company, and, for so long as they contined to be shareholders in the Jamaica Company, and for five years thereafter, would sell milk products exclusively to the Jamaica Company; and, (e) that the parties were to lease their Jamaican registered trade-marks to the Jamaica Company and endeavor to prevent infiltration into Jamaica of milk products bearing their trade-marks. Also, on or about March 23, 1939, the two stockholders in the Association entered into exclusive sales agreements with the Jamaica Company, comparable to the exclusive sales agreements heretofore described between the two stockholders in the Cuban Company.93/

(4) Manufacturing and Distributing Agreements.

From the time of the organization of the Jamaica Company, March 22, 1939, the Association and Nestle Company have annually entered into respective one-year so-called manufacturing agreements with the Jamaica Company providing for the sale to them of unlabeled milk products manufactured by the Jamaica Company and for the resale by them to the Jamaica Company of such products after those products had been fully labeled. The January 16, 1941 "Manufacturing Agreement" between the Association and the Jamaica Company provided for the manufacture by the Jamaica Company of milk products which the Jamaica Company would then sell unlabeled to the Association, after which sale the Jamaica Company, acting as the Association's agent for that purpose, would label those products with brands and trade-marks owned by the Association. The so-called "Distributing Agreement," also dated January 16, 1941, between the Association and the Jamaica Company, provided that the Jamaica Company would buy from the Association the milk products which it had previously sold to the Association pursuant to the terms of the aforementioned manufacturing agreement; and that the price to be paid by the Jamaica Company would equal the cost of such products to the Association plus an "overage." This arrangement was designed to accomplish the same result as would have been accomplished

93/T. 287-289; Ex. 3, Doc. 3-3, Cf. T. 218, 240.

had the Association leased to the Jamaica Company the trade-marks owned by the Association in Jamaica, which under the Jamaican trade-mark law was not permissible.94/ The third paragraph of said "Distributing Agreement" reads as follows:

"Third: The Jamaica Company agrees not to sell any of said Goods outside of Jamaica and undertakes to use its best endeavors to prevent any of said Goods distributed by it in Jamaica from infiltrating into other countries."

(5) Association's Shareholders.

At the time the Association became a shareholder in the Jamaica Company, March 23, 1939, the Association's shareholders, Carnation Company and Pet Milk Company, respectively, entered into exclusive sales agreements with the Jamaica Company, those agreements corresponding substantively to the exclusive sales agreements between Carnation and Pet, respectively, and the Panama Company, which in turn were "like the Association Agreement with the Panama Company of December 31, 1937.95/

(6) Association's Contentions.

Officials of the Association concede that it is the owner of a portion of the stock of the Jamaica Company, participates in the Jamaica Company's management to the extent that the Association nominates two of the directors, who attend no meetings of the board, and sends its proxies to an officer or employee of the Jamaica Company without prescribing how the shares represented by the proxies shall be voted; that the Jamaica Company has its own local management, and its outside supervision, if any, stems entirely from the Nestle Company organization; that the Nestle Company and the Association are the only shareholders, and, as joint-venturers the two stockholders in the Jamaica Company are not now and have never been during the life of the Jamaica Company competitors in Jamaica; that the Association has turned over all its trade and business in milk products in Jamaica to the Jamaica Company; that the Association has merely appointed an exclusive distributor and sales agent in that area in pursuance of its established practice followed in other foreign territories; that it was perfectly normal that the Association would agree to sell exclusively through the Jamaica Company and to endeavor to prevent infiltration of milk products under the Association's brands into the Jamaica territory; and, that the appointment of an exclusive distributor and sales agent, together with the agreement to sell only through such agent and distributor, while endeavoring to prevent the products of the Association being otherwise sold in Jamaica, is not an agreement to endeavor to exclude all foreign milk products from Jamaica. In fine, the Association urges that its ownership of stock and contractual relationships with respect to the Jamaica Company violate no law; that it is not the

94/T. 288, 290, 298; Ex. 3, Docs. 8-C, 8-D.
95/T. 266, 290; Ex. 3, Doc. 7-D.

understanding of the Association that Congress meant to provide that an export trade association could engage in no activities other than exporting; that the antitrust law does not invalidate exclusive sales agreements; and, that even were the Export Trade Act subject to the construction that it precludes activities other than exporting, an exclusive sales arrangement which relates solely to exports would raise no question of ultra vires.96/

VI. MANAGEMENT OF FOREIGN PLANTS.

A. Proceedings.

Testimony was taken with respect to an allegation in the Bill of Particulars to the effect that the Association managed foreign corporations engaged in the manufacture, sale and export of milk products, and in international trade incidental thereto.97/

B. Incidents of Management.

The Association has furnished instruction, advice and assistance to each of its six wholly-owned foreign subsidiaries touching various aspects of the business of each subsidiary. As sole stockholder, the Association has decided all major questions of policy and elected the members of the Board of Directors who are responsive to the will of the sole stockholder. However, each foreign manufacturing subsidiary of the Association has maintained its own local management to supervise the day-to-day business and its own officers and directors who act upon routine corporate matters.98/

C. Association's Contentions.

The Association does not perceive that the activities herein named constitute "management," or, even if so, that such activities are in any sense a violation of the law.99/

VII. FOREIGN AGREEMENTS.

A. Agreements of Assistance with Subsidiaries.

(1) Proceedings.

The Bill of Particulars stated, in substance, that the Association, under agreement, furnished technical advice, together with other services, to its wholly-owned foreign corporations, with respect to production and sale of milk products in foreign countries. Testimony and exhibits were introduced on this subject.100/

96/T. 291-294; Cf. T. 317, 318.
97/T. 146-157.
98/T. 103-111, 116, 127, 132, 136, 140; 149; Ex. 2, Docs. 4-A to 4-F, incl.
99/T. 150-152.
100/T. 158-176; Ex. 2, Docs. 4-A to 4-H, inc.

(2) Consultant Agreements.

The Association entered into a consultant's agreement with each of its six foreign subsidiary corporations engaged in the production and sale of milk products in foreign countries. Under this agreement the Association not only furnished instruction, advice and assistance with respect to all aspects of the business of, but also made available by lease to such subsidiaries, in some instances at least, certain of its trade-marks.101/ Because of inadequate personnel in the foreign countries experienced in operating foreign condenseries producing evaporated and condensed milk products, the Association was at the outset confronted with the necessary alternative of finding skilled technicians in the United States who would be agreeable to residing abroad, or setting up its own technical staff in the United States for the purpose of supplying the instruction, advice and assistance required in the successful operation of its foreign plants. The latter alternative was adopted. In order to meet the expense of maintenance of high salaried technical and administrative experts, it was decided that each foreign subsidiary company should pay the Association direct for services thus rendered, and this practice has been followed.102/ The reduction of this practice to a formalized basis is related in the testimony of Mr. Gunther, reading as follows:

> "It was also apparent that the Association's only then existing source of increased income to absorb such increased costs of operation was dividends paid by the foreign companies concerned. But income moving to the Association from one of its foreign subsidiaries in the form of dividends had already been subjected to the profits tax assessed against the net taxable income of said subsidiary by the country in which it was domiciled, and it was therefore felt that this was not a proper channel of reimbursement. To the extent that the Association supplied the local management of any such foreign subsidiary with instruction, advice, and assistance, that subsidiary was released from the necessity of permanently employing skilled technicians and administrative officers whose salaries would constitute a legitimate business expense deductible from its gross income before determination of its net income subject to the profits tax. It seemed only equitable, therefore, that if the Association was to continue supplying such instruction, advice, and assistance, it should be paid for that service directly by the foreign company receiving the service and, moreover, that so far as Lait Gloria was concerned, the Association should be reimbursed by Lait Gloria for all such services rendered to date.
>
> "Accordingly, on October 15, 1926 the Association and Lait Gloria entered into a written agreement (Document No. 4-A) which by its terms was made retroactive to January 1, 1925, in order to cover the period during which the Association had been furnishing advice and assistance pursuant to an oral agreement and in which the parties agreed as follows:

101/T. 159-161.
102/T. 161-163.

1. The Association agreed to transfer to Lait Gloria its French 'Gloria' and 'Favorita' trade-marks for use in France and the French Colonies, subject to re-transfer of those marks to the Association by Lait Gloria at the termination of the agreement;

2. The Association agreed, in substance, to furnish Lait Gloria with such instruction, advice, and assistance as might be necessary to enable Lait Gloria to operate successfully; and

3. Lait Gloria agreed to pay the Association fees computed at the rate of a stated amount per case of milk products sold by Lait Gloria.

"It was then agreed between the Association and Lait Gloria that the total consultant fees payable by Lait Gloria for the year 1925 would be Fcs. 606,605 and for the year 1926 Fcs. 400,000 and, those sums being paid, the net result was that the consultant arrangement was operative from the outset of the manufacture of evaporated milk by Lait Gloria."

Contracts were entered into with the remaining subsidiaries as follows: (with Document numbers from Exhibit 2) German Company, October 26, 1926 (4-B), Holland Company, March 1, 1935 (retroactive to 1927) (4-C), English Company, May 15, 1935 (4-D), South African Company, April 1, 1940 (4-E) Peru Company, August 1, 1941 (4-F).

The provision for services in the French contract (Ex. 2, Doc. 4-A) reads as follows:

"Article 2 - The American Company agrees to give to the French Company, which hereby accepts such, in the industrial as well as in the commercial field, its help to the fullest extent possible; that is to say, the American Company promises to supply the French Company with all new knowledge and the supervision necessary to make possible the manufacture of the most satisfactory products."

The German contract, like the preceding (French) contract specified compensation as a "royalty" or "fee," based on a fixed amount per case of milk products manufactured by the subsidiary. The services provision in this contract reads as follows:

"2.

The Firm agrees to assist the Company in connection with the development of a milk manufacturing plant and in particular to place at its disposal a technically skilled personnel and officials (employees) to assist in the work, as also to make known the manufacturing secrets and the necessary instructions and informations, same to be used confidentially by the Company."

The contracts of the remaining four also fix compensation on quantity of cases produced but refer to compensation as "consultant's fee." The services provision is substantially the same for all four, that of the Holland Company (Doc. 4-C) being here cited:

"(1) General agrees to render to Amilko the following services:

General agrees to advise Amilko from time to time on the selection of sites for milk factories and to give its opinion as to the desirability of sites suggested from the point of view of available milk supply, transportation to and from the factory, suitability of water supply in relation to manufacturing processes, and on all other matters relative to the selection of sites.

General also agrees to lay out and plan such factories to meet the manufacturing conditions specified by Amilko.

General will advise Amilko on the selection of machinery and equipment which, as the result of General's experience, it believes most suitable.

General will supervise the construction of such factories for Amilko and the installation of machinery and equipment.

General will advise Amilko in the selection of employees to operate such factories and will supervise their training.

General will supervise all experimental runs and will indicate such protective measures as must be taken by Amilko to remedy any defects in manufacturing which may occur.

After each such factory is placed in operation, General will supervise all manufacturing operations to the end that a uniformly high quality of product will be manufactured.

General will place at the disposal of Amilko, during the life of this agreement, such information and knowledge relating to the processes in which Amilko is interested as General has obtained in the many years of its experience with such problems. General will also communicate information regarding new processes, discoveries or improvements of which it may become possessed in the future.

General will advise on methods of financing the construction and operation of the factory or factories and will at Amilko's request use its best endeavors to interest bankers or others in such financing as General may consider appropriate.

General will advise Amilko regarding the purchase of materials to be used in its business and will place at its disposal the facilities now being availed of by General in its worldwide activities.

General will advise Amilko on all problems relating to the distribution and sale of tinned milk products, including the advertising thereof, both in domestic and foreign markets.

General will advise Amilko on all matters relating to accounting methods, including cost accounting, budgeting, statistics and all other records."

No evidence in the form of correspondence in connection with aforesaid services was included in the record.103/

Explaining the compensation, Mr. Gunther's testimony is as follows:

"Although the October 26, 1926 agreement (Document No. 4-B) between the Association and Gluckskiee is entitled 'License Contract,' it is apparent from a study of its provisions that such term is a misnomer; similarly, the term 'royalty' in the October 15, 1926 agreement (Document No. 4-A) between the Association and Lait Gloria is a misnomer, payments made by Lait Gloria to the Association thereunder being fees constituting remuneration for services rendered. This early misuse of the terms 'License' and 'royalty' has reflected itself in various subsequent correspondence as well as in various accounting records of the Association. That is particularly true with reference to the term 'royalty' which whenever and wherever so used, represents merely an ill-advised selection of terminology. The Association does not receive from any of its foreign subsidiaries income in the form of 'royalties' within the proper meaning of that term since it receives no income from any of its subsidiaries in consideration of the right to use property or property rights owned by the Association. What the Association does under each of said consultant agreements is actually to sell to its foreign subsidiary information and instruction relating to every aspect of carrying on the business of manufacturing and selling milk products.

"Although the six active consultant agreements hereinabove discussed are not identical in language and the later ones are much more detailed in their provisions than the earlier ones, the services rendered by the Association to the foreign companies are identical in every case."

(3) Consultant Agreement with Stockholder's Affiliate.

In addition, the Association entered into a similar so-called consultant's agreement with Carnation Products Company, an affiliated company, on April 7, 1937, which agreement expired December 31, 1941. This agreement covered the purchase and resale, after labeling, of milk products in Japan.104/

103/T. 162-171, Ex. 2., Docs. 4-A to 4-F, incl.
104/T. 168, 169; Ex. 2, Doc. 4-G.

(4) Association's Contentions.

The Association does not perceive that its contractual relationships with its wholly-owned foreign subsidiaries as herein described in any way violate the law; or that such relationships and activities constitute either foreign or domestic commerce; and it has never construed the Export Trade Act as restricting the Association's activities exclusively to exporting from the United States. On the contrary the Association has understood that Congress was merely emphasizing the dividing line it was drawing between "export trade" and "domestic trade," when the language "engaged solely in export trade" was used in the Act; and that Congress in no sense intended to provide that Export Trade Act corporations could engage in no activities other than exporting. In fine, the Association takes the position that there is no sound legal basis for construing the Act so narrowly; that since competitive domestic corporations may, under existing law, jointly own a foreign corporation carrying on business not constituting domestic or foreign commerce, there was, therefore, no reason for Congress to refer expressly to such a situation in the Export Trade Act; and that the failure of Congress to provide expressly in that Act that an association or corporation organized and operating thereunder might also engage in other activities not forbidden by the antitrust laws, is not logically susceptible to the conclusion that Congress thereby intended to preclude such export trade association from thus engaging in any activities other than exporting from the United States.105/

B. Label Agreement with Foreign Competitor.

(1) Proceedings.

The Bill of Particulars, in effect, challenged as restrictive, the so-called cow's head label contract between the Association and a foreign corporation, and alleged that markets are allocated by the use of such labels. Testimony was adduced and the so-called cow's head label contract introduced relative to this matter.106/

(2) Background.

Throughout a period of seventeen years prior to 1936, the Association had developed trade-marks which bore or included the picture of a cow's head as an integral part of the design used on labels placed on milk products sold in foreign markets. While the Association was thus developing and establishing its cow's head labels in various foreign markets, a similar label was also developed and widely used by Nestle Company. The Nestle Company was organized in Switzerland and operated in competition with the Association in various foreign countries.107/ As the Association and the Nestle Company became chief competitors of each other in foreign markets, conflict and confusion arose between them as a result of the use of labels thus similar in design. Such confusion extended to their customers, especially in countries where illiteracy was more or less prevalent

105/T. 171-173.
106/T. 177-201; Ex. 2, Doc. 5-A.
107/T. 179, 180.

among customers, and the chief means of identifying any product was by its label or trade-mark design. The Association and Nestle Company, therefore, decided to attempt a solution of the problem thus posed through an agreement, the asserted purpose of which was to avoid further confusion and conflict in the use of their respective cow's head labels.108/

(3) Cow's Head Label Agreement.

On October 6, 1936, the Association and the Nestle Company entered into the so-called Cow's Head Label Agreement, which provided, among other things, (a) that world-wide markets were to be divided into three categories, namely, those of the Nestle Company, the Association and "open markets"; (b) that the markets of the Nestle Company and the Association respectively were to be those in which the previously established use of the cow's head label of either party predominated over the other's use in such markets; (c) that the "open markets" were to be those not classified either as Nestle Company or Association markets; (d) that each party would refrain from using its cow's head label in the other's established markets; and, (e) that whenever either the Association or the Nestle Company desired to establish its label in any "open market" the party desiring so to do would first agree with the other party that the particular "open market" concerned would thenceforth be considered the market of the party first indicating its desire to secure such new market. This contract allocates most of North America as the territory of the Association, the Nestle allocation being specified as follows:109/

"NORTH AMERICA
None
CENTRAL AMERICA
Virgin Islands
Leeward Islands

WEST INDIES
None."

The cow's head label had been established in some eighty-four markets and each corporation had achieved priority in the use of the cow's head label in certain of those markets.110/ The Association agreed not to use the cow's head label in twenty-four, and the Nestle Company in sixty, markets theretofore established. The contract accorded to the Nestle Company the right to the exclusive use of the cow's head label in Holland, although the Association was given the privilege of exporting milk products from Holland under its own cow's head label.111/

The record evidences no significant diminution of sales by the Association in designated territories where it agreed in 1936 to refrain from using the cow's head label, to use another or different one, and,

108/T. 179-181.
109/T. 181-183; Ex. 2, Doc. 5-A.
110/T. 191.
111/T. 196.

thereafter, to accord to the Nestle Company the exclusive right to sell under a trade-mark of similar design. On the contrary, the factual proof indicates that sales of the Association increased in countries in which the Association, prior to 1936, had sold under its cow's head label, and subsequently under another label. Except for some five minor variances, the following chart of sales made by the Association in countries wherein it agreed not to use the cow's head label shows a substantial increase of sales (measured by number of cases) from 1935 to 1940, inclusive:

Territory	1935	1936	1937	1938	1939	1940
Malta	1280	660	2530	3722	6365	1250
Peru	34710	40344	57198	70537	74762	36215
Egypt				40		
Madagascar	200	150	50			
Indo-China	2195	3592	4670	3225	7329	28484
Netherlands East Indies	11134	16669	39219	37249	34118	47707
China	42609	32588	42175	27032	22424	41440
Ceylon	342	2174	4401	3845	4402	6925
Burma	11743	19872	18482	12065	5669	12814
Belgian Congo						625
Palestine						6

Of the twenty-four countries in which the Nestle Company was given the exclusive right to sell under the cow's head label, there appears to have been thirteen territories wherein no sales were made by the Association either before or after the 1936 agreement.112/

(4) Stockholders' Agreement Relative to Cow's Head Label.

The Association also undertook to secure compliance by one of its two stockholders with the terms of the cow's head agreement.113/

(5) Association's Contentions.

It is urged by the Association that the cow's head label agreement with its principal competitor 114/ related not to the sale of milk products as such in foreign markets, but sought merely to eliminate the existing confusion between labels so similar in design that trade-mark infringement litigation was resulting from their use in the same markets; and that the only competition, if any, that was terminated was solely competition engendered through the use of similar labels which caused buyers to confuse the product of one with that of the other manufacturer.

Moreover, the Association contends that its sales have not only increased in markets in which it agreed to refrain from using the cow's head

112/T. 186.
113/T. 189; Ex. 2, Doc. 5-A.
114/T. 193.

label,--a fact cited which it says proves that no restraint of trade even in those markets resulted,--but that in any event restraining competition is illegal only when the competition restrained is itself legal, and that the anti-trust laws do not require competitors to engage in competition which is illegal under other laws.115/

C. Cancellation and Revision of Foreign Agreements.

(1) Joint-owned Companies.

During the formal hearings in this matter, counsel for the Association presented some twenty-one agreements dated August 27, 1945, and requested that said agreements be received in evidence. The agreements in question were received in evidence. They relate to the three joint-owned companies in Cuba, Jamaica and Panama, and were executed by those companies, their joint owners, and the stockholders of the Association. These agreements in effect purport to provide, among other things, for cancellation by the parties of other agreements theretofore existing, with respect to voting trusts, exclusive sales agents, leased trade-marks and a change in the method in dealing with the stock in said Cuban, Jamaica and Panama Companies.116/

(2) Cuban Contracts--Old and New.

Concerning the newly executed contracts, as of August 27, 1945, with reference to Cuga, it was testified: "These new agreements provide for a change in the share ownership arrangement and * * * cancel the old exclusive sales agreements * * * with the result that the Association is simply a stockholder in the Cuban company, and has leased certain trado-marks to the Cuban company, but has the right to ship into Cuba at any time independently of the Cuban company."117/

For further details with reference to said Cuban contracts both old and new, attention is invited to the testimony, and exhibits. 118/ to 127/, incl.

115/T. 184, 185, 187.
116/T. 248-256; 276-281; 299, 302; Exs. 4-A to 24-F, incl.
117/T. 248-256; Exs. 4-A to 13-E, incl.
118/T. 248, 249; Ex. 4-A to 4-C, incl.; agreement, August 27, 1945, which purports to cancel voting trust agreement of December 17, 1931. Cf. Ex. 3, Doc. 6-B.
119/T. 248, 249; Exs. 5-A to 5-C, incl.; agreement, August 27, 1945, which purports to cancel voting trust agreement of March 31, 1934. Cf. Ex. 3, Doc. 6-D.
120/T. 249, 250; Ex. 6: agreement, August 27, 1945, which purports to cancel exclusive sales agreements of December 17 and 19, 1931. Cf. Ex. 3, Docs. 6-E, 6-F.
121/T. 250, 251; Ex. 7: agreement, August 27, 1945, which purports to cancel manufacturing agreement of August 21, 1941. Cf. Ex. 3, Doc. 6-G.
(Footnotes continued on page 53).

(3) Panama Contracts--Old and New.

Concerning the newly executed contracts, as of August 27, 1945, with reference to Panama, it was asserted: "These contracts provide for a new arrangement of share ownership * * * cancel the old exclusive sales agreements * * * provide for the lease of certain Panamanian trade-marks of the Association to the Panama Company, and * * * permit the Association to sell milk in Panama to any one or to any company * * * it is a cancellation of the old agreements which are in Exhibit 3, statement 7."128/ For further details with respect to said Panama contracts, both old and new, attention is invited to the testimony, and exhibits.129/ to 135/, incl.

Footnotes continued from page 52.
122/T. 251; Ex. 8: agreement, August 27, 1945, which purports to cancel a sublease of the "Pet" trade-mark dated June 6, 1941. Cf. Ex. 3, Doc. 6-H.
123/T. 252; Ex. 9: agreement, August 27, 1945, which purports to cancel exclusive sales agreements dated December 17 and 19, 1931. Cf. T. 218, line 6.
124/T. 252, 253; Ex. 10: agreement, August 27, 1945, which purports to cancel exclusive sales agreements of December 17 and 19, 1931. Cf. T. 218, Ex. 3, Docs. 6-E, 6-F.
125/T. 253, 254; Ex. 11-A to 11-F, incl.: agreement, August 27, 1945, which purports to set forth new or revised agreement with respect to the ownership of stock in the Cuban company. Cf. T. 248, Ex. 4-A to 4-C, incl.; also Ex. 3, Docs. 6-B.
126/T. 254; Ex. 12-A to 12-E, incl.: agreement, August 27, 1945, which purports to lease the Association's Cuban trade-marks to the Cuban company.
127/T. 254, 255; Exs. 13-A to 13-E, incl.: agreement, dated August 27, 1945, which purports to sublease the Pet trade-mark to the Cuban company.
128/T. 281; Exs. 14-A to 20-E, incl.
129/T. 276, Exs. 14-A to 14-B: agreement, August 27, 1945, which purports to cancel share-ownership agreement of December 31, 1937. Cf. T. 263; Ex. 3, Docs. 7-B.
130/T. 277, Ex. 15: agreement, August 27, 1945, which purports to cancel agreement for the purchase of imports, December 31, 1937. Cf. Ex. 3, Doc. 7-C.
131/T. 277, 278; Ex. 16: agreement, August 27, 1945, which purports to cancel exclusive sales agreement of December 31, 1937. Cf. Ex. 3, Doc. 7-D.
132/T. 278, Ex. 17: agreement, August 27, 1945, which purports to cancel exclusive sales agreement of December 31, 1937. Cf. T. 267, lines 1 and 2; Also Ex. 3, Doc. 7-D.
133/T. 279, Ex. 18: agreement, August 27, 1945, which purports to cancel exclusive sales agreement of December 31, 1937. Cf. Ex. 3, Doc. 7-D; also T. 266, 267.
134/T. 279, 280; Exs. 19-A to 19-E, incl: agreement, August 27, 1945, which purports to revise agreement of December 31, 1937. Cf. Ex. 3, Doc. 7-B; see also T. 263, et seq.
135/T. 280, 281; Exs. 20-A to 20-E, incl: agreement August 27, 1945, which purports to lease Associations's trade marks to the Panama Company.

(4) Jamaica Contracts--Old and New.

Concerning the newly executed contracts, as of August 27, 1945, with reference to Jamaica, it was testified: "The exhibits in question cancelled the old exclusive sales agreement and permits the shipment into Jamaica of canned milk to anyone, and also sets forth the new arrangement of the share ownership."136/

For further details with reference to said Jamaica contracts, both old and new, attention is invited to testimony, and exhibits.137/ to 140/, incl.

D. Contracts not Cancelled.

On January 16, 1941, the Association and the Jamaica Company entered into a "Manufacturing Agreement" and a "Distributing Agreement,"141/ pursuant to which the Jamaica Company agreed to manufacture and sell unlabeled milk products to the Association, and repurchase such products after the Association had attached thereto its own trade-marks. It is provided in the "Distributing Agreement" that the Jamaica Company would not sell outside of Jamaica milk products bearing the labels of and purchased from the Association. These two agreements have not been cancelled.142/

Included among the foreign contracts, not cancelled, which remained in effect at the close of the proceedings herein, is the so-called Cow's Head Agreement.143/ The new or revised agreements, previously referred to, having to do with new relationships created thereunder, as indicated, became effective on August 27, 1945.

136/T. 302; Exs. 21 to 24-F, incl.
137/T. 299, 300; Ex. 21: agreement, August 27, 1945, which purports to cancel March 23, 1939, agreement. Cf. Ex. 3, Doc. 8-B.
138/T. 300, 301; Ex. 22: agreement, August 27, 1945, which purports to cancel exclusive sales agreement of March 22, 1939. Cf. T. 290, lines 5 to 14, incl; also Ex. 3, Doc. 8-D.
139/T. 301; Ex. 23: agreement, August 27, 1945, which purports to cancel exclusive sales agreement of March 22, 1939. Cf. Ex. 3, Doc. 8-D; also T. 290, lines 5 to 14, incl.
140/T. 301, 302; Ex. 24-A to 24-F, incl: agreement, August 27, 1945, which purports to set forth revised agreement of March 23, 1939, with respect to the ownership of stock in the Jamaica Company. Cf. Ex. 3, Doc. 8-B.
141/T. 313; Ex. 3, Docs. 8-C, 8-D.
142/T. 309, line 16, Docs. 8-C, 8-D. See also Infra VIII, D.
143/T. 255, 256, 281, 301, 302; Ex. 2, Doc. 5-A.

VIII. FOREIGN PRODUCTION NOT FOR EXPORT--TRADE-MARKS.

A. Proceedings.

A paragraph in the Bill of Particulars stated that the Association entered into foreign agreements which provided that milk products would not be shipped outside of the foreign countries where produced. Evidence was given and exhibits were adverted to respecting this item.144/

B. Cuban Company Production.

An Agreement of December 17, 1931, between the Association and the Cuban company, provided that the Cuban company would not sell or sell for resale outside of Cuba milk products packed under Association trade-marks.145/

C. Panama Company Production.

A contract dated December 31, 1937, among the Association, the two Nestle companies and the Panama Company, provided that so long as the then shareholders owned the stock of the Panama Company, the Panama Company would not export from Panama. It is contended by the Association that it and the Nestle Company were dealing with each other not as competitors, but as sole and joint owners of the Panama Company; that the contract relates only to milk products imported into Panama, since the Association had not leased its trade-marks to the Panama Company;146/ and, that the stockholders were merely making a written agreement which could as easily have been presented in a stockholders' meeting of the Panama company.

D. Jamaica Company Production.

On January 16, 1941, a manufacturing agreement and a distributing agreement provided that the Jamaica Company would manufacture and sell unlabeled milk products to, and repurchase from, the Association after such products had been labeled; and that the Jamaica Company would not thereafter sell such labeled products outside of Jamaica.147/ As stated, these two contracts have not been cancelled and, it is contended by the Association, were entered into solely because direct leasing of trade-marks is not permitted under the Jamaica trade-mark laws.148/

E. Association's Contentions.

Officials of the Association assert that agreements relating to the use of Association trade-marks by foreign companies do not constitute agreements that foreign companies will refrain from shipping milk products outside

144/T. 309-318; Ex. 3, Docs. 6-E, 7-C, 8-C, 8-D.
145/T. 313; Ex. 3, Doc. 6-E, par. 13.
146/T. 312, Ex. 3, Doc. 7-C, par. 7.
147/T. 313, 314; Ex. 3, Docs. 8-C, 8-D.
148/T. 309.

of the countries where manufactured but merely define the territorial limits if authorized use of certain trade-marks;149/ that the prohibition against shipment outside the countries where produced is specifically limited to products labeled with trade-marks belonging to the Association; that the antitrust laws have not been violated by the contractual relationship heretofore described in connection with the Cuban, Panamanian and Jamaican markets; and, that such relationships, therefore, are fully intra vires the Association.150/

IX. FOREIGN STOCK—NO SALES FOR FIVE YEARS AFTER OWNERSHIP.

A. Proceedings.

An allegation in the Bill of Particulars is made to the effect that the Association agreed with joint stockholders in foreign corporations to make no sales of milk products in certain areas for five years after the Association had ceased to be a stockholder in such foreign corporations. Testimony was adduced and exhibits referred to in connection with this item.151/

B. Stock in the Jamaica Company.

The "Share Ownership Agreement," dated March 23, 1939, between the Association and the Nestle Company, provided, in effect, that both of the parties would turn over to their jointly-owned Jamaican Company their business in milk products so long as either remained the beneficial owner of stock therein; that for five years after either had ceased to be a stockholder, such former stockholder would make no sales in Jamaica except to the Jamaican Company; and, that the parties would endeavor to prevent infiltration of milk products into Jamaica under their trade-marks or labeled brands.152/

C. Stock in the Panama Company.

An "Agreement for Purchase of Imports," dated January 1, 1938, provided that both of the parties thereto, namely, the Association and the Nestle Company, would turn over their business in milk products to their jointly owned Panamanian Company so long as either party remained a stockholder, and that for five years after each or either had ceased to be a stockholder such former stockholder would make no sales in Panama except to the Panama Company; and, that the parties would endeavor to prevent infiltration of their brands into Panama.153/

D. Association's Contentions.

Officials of the Association, in effect, contend that their intention was merely to continue to make sales in any such foreign country only

149/T. 314, 315.
150/T. 314-318; Cf. T. 219-224; 269-271; 290-294.
151/T. 320-328.
152/T. 323; Ex. 3, Doc. 8-B, par. 12.
153/T. 323, 324; Ex. 3, Doc. 7-C, par. 1.

upon the order of the foreign company involved; that the agreement to sell only to a specified purchaser for five years is not an agreement to make no sales; and, that not only is no law violated by such an exclusive sales agreement, but the agreement is within the scope of the corporate power of the Association under the Act.154/

X. ASSOCIATION AS EXCLUSIVE EXPORT AGENT.

A. Proceedings.

The Bill of Particulars directed attention to agreements between the Association and its members and between its members, providing, in effect, that all export business of the members would be conducted by the Association. Testimony was taken and exhibits introduced in connection with this allegation.155/

B. Operations Prescribed.

On April 12, 1919, an agreement between the Association and its stockholders purported to prescribe the manner in which the Association should operate, providing, among other things, that the Association should be the exclusive selling agent for milk products manufactured by its stockholders and marketed in countries outside of the United States.156/

C. Association's Contentions.

It is conceded by the Association that the language in the agreement of April 12, 1919, is ambiguous, but it is asserted that such language if literally construed relates to "direct marketing" of milk products in foreign countries; and, that subsequent activities of the parties disclose that their actual intent was that the shareholders of the Association were to be restricted only from engaging in direct marketing of milk products in foreign countries, and not from making exports from the United States independently of the Association.157/ It is further asserted by the Association that its shareholders have in fact regularly made export sales other than through the Association, and have made sales in the United States to domestic purchasers who exported such milk products to foreign countries.158/ It was testified that the term "direct marketing" implies that Pet and Carnation, stockholders of the Association, would not engage in business in foreign countries directly but would make sales for export from the United States to foreign countries.159/ The Association also concedes that it has declined to accept offers to purchase its products but not because the prospective purchasers were exporters or competitors of the Association or of its shareholders, nor because of the Association's

154/T. 325.
155/T. 328-340; Ex. 3, Docs. 11-A to 11-I, incl.
156/T. 331; Ex. 3, Doc. 11-A, par 1.
157/T. 331, 332.
158/T. 331-333; Ex. 3, Docs. 11-I, 11-H.
159/T. 338, 339.

appointment as exclusive selling agent for its shareholders. The reason assigned for such refusal to sell to domestic exporters stems from Governmental regulations as to what constitutes an "export sale" for the purpose of computing the maximum price at which products could be sold,160/ since the company could not afford to make sales at domestic ceiling prices.

XI. ASSOCIATION'S FAILURE TO FILE INFORMATION.

A. Proceedings.

It is charged in the Bill of Particulars that the Association failed as required by law to report fully to the Commission upon the methods and practices in conducting its business.161/

B. Association's Contentions.

Officials of the Association assert that it was guided in filing information covering the exportation of milk products from the United States by its understanding of the Export Trade Act which was construed to apply only to that portion of business done involving exports from the United States and not business transacted wholly within a foreign country.162/ The Association concedes that it omitted to include data touching various aspects of its business which were not incidents of actual exportation of milk products from the United States to foreign countries; and, that it incorporated into reports to the Commission such material only as related to that portion of its business having to do with direct exportations from the United States to foreign countries. The Association accordingly proceeded upon the assumption that insofar as it was exporting milk products from the United States to foreign countries, thereby engaging within the United States in foreign commerce, the Export Trade Act governed its activities, granting its immunity from those provisions of the Sherman Act and the Clayton Act which otherwise would have made illegal its joint ownership by Carnation Company and Pet Milk Company, and subjecting it to supervision by the Federal Trade Commission; but, that insofar as it was engaging in business activities not constituting commerce in or from the United States, the Export Trade Act neither governed its activities nor precluded its engaging therein; that the Association has functioned in the belief that the periodic reports it was required to file with the Commission related only to so much of its business as consisted of direct exportations from the United States to foreign countries; and, that not until 1944, when a Federal Trade Commission attorney raised the question whether the Association could legally function as an export association under the Export Trade Act and at the same time engage in activities other than exporting from the United States, in which it had long been engaged, did the Association have reason to suspect that the Commission might not construe the Export Trade Act in the same manner as did the Association. The Association maintains that there can be no question that it was sincere in interpreting the Export Trade Act as it did; and, that conclusive proof thereof lies in the fact that had the Association otherwise interpreted the Act it would

160/T. 336, 337.
161/T. 340-348.
162/T. 341, 342.

have been simple for its stockholders to organize a fourth corporation, which, functioning in no way under the Export Trade Act, could have carried on those activities unrelated to direct exporting in which the Association has engaged. Finally, the Association asserts that, consistent with its understanding of the Act, it exercised the utmost good faith in preparing reports to the Commission, and if it erred, it erred through lack of understanding, not by intent.163/

163/T. 344, 345.

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